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In the Supreme Court of the United States

OCTOBER TERM, 1992

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

MARTA ZAMBRANO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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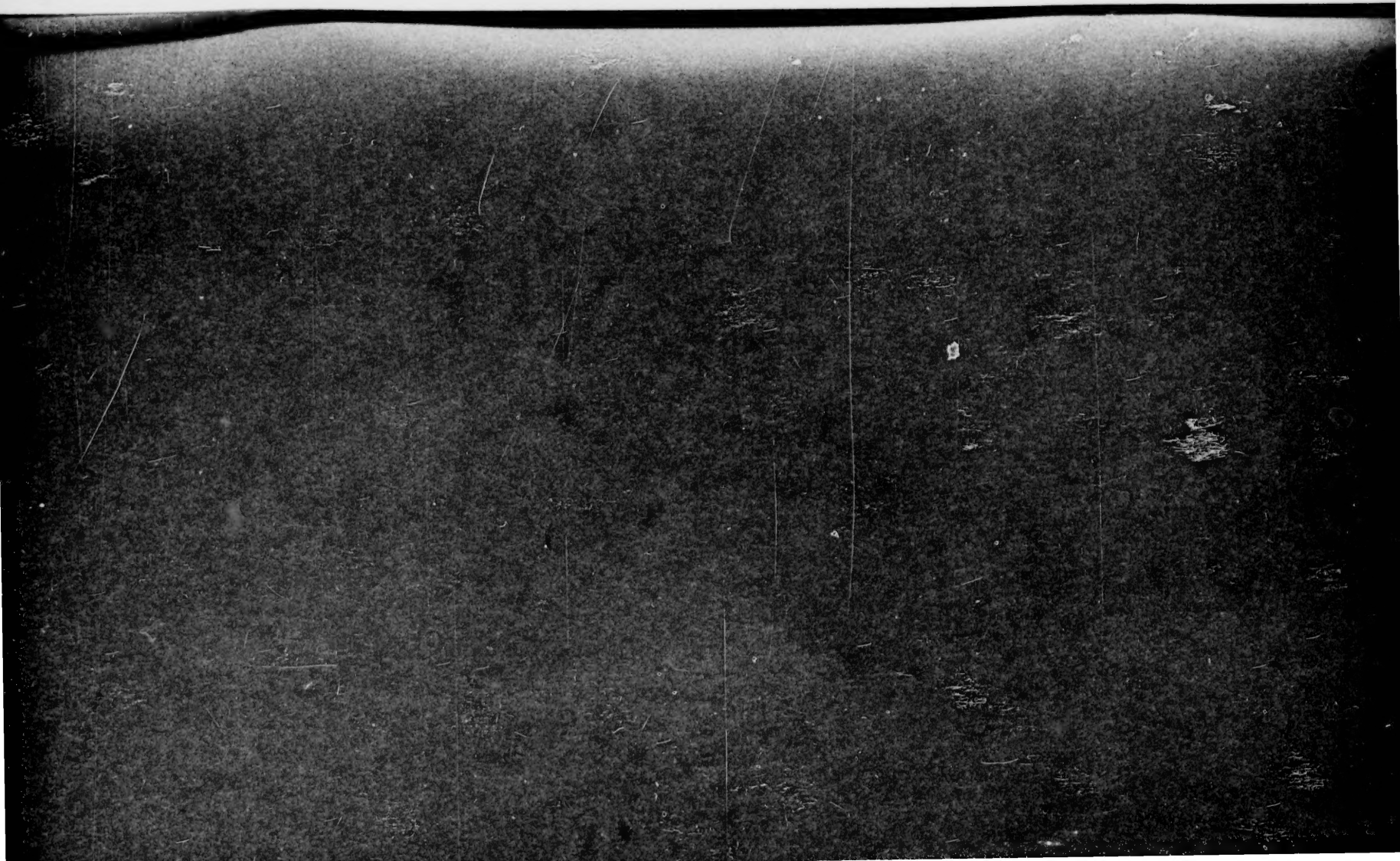

QUESTIONS PRESENTED

1. Is it proper for a district court to entertain a lawsuit brought by aliens seeking adjustment of status under 8 U.S.C. 1255a, which challenges the Immigration and Naturalization Service's regulations articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering the Immigration and Naturalization Service to extend that deadline?

PARTIES TO THE PROCEEDING

Petitioners are the Immigration and Naturalization Service, William P. Barr, Attorney General of the United States, Alan Nelson, and Harold Ezell.

Respondents are Marta Zambrano, Margarita Rodriguez, Graciela Lopez, Andrea Ruiz, Martha Ozuna, and Jorge Perdomo.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	7
Appendix A	1a
Appendix B	12a
Appendix C	38a
Appendix D	43a
Appendix E	67a
Appendix F	75a

TABLE OF AUTHORITIES

Case:

Catholic Social Services, Inc. v. *Thornburgh*, 956 F.2d 914 (9th Cir.), cert. granted, 112 S. Ct. 2990 (1992) (No. 91-1826) 6, 7

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1182 4
8 U.S.C. 1182(a) (1988) 4
8 U.S.C. 1182(a)(4) (Supp. III 1991) 4
8 U.S.C. 1182(a)(15) (1988) 3

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:

§ 601(a), 104 Stat. 5067 4
§ 603(a)(13)(H), 104 Stat. 5083 4

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 2
8 U.S.C. 1255a 2, 6
8 U.S.C. 1255a(a) 2

Statutes and regulations—Continued: Page

8 U.S.C. 1255a(a)(1) 3
8 U.S.C. 1255a(a)(4) 3
8 U.S.C. 1255a(d)(2)(B)(iii) (1988) 4
8 U.S.C. 1255a(d)(2)(B)(iii) (Supp. III 1991) 4
8 U.S.C. 1255a(f) 3, 5
8 U.S.C. 1255a(f)(1) 3, 6
8 U.S.C. 1255a(f)(2) 3
8 U.S.C. 1255a(f)(3) 3
8 U.S.C. 1255a(f)(4) 3
8 C.F.R. (1988):
Section 245a.1(i) 4
Section 245a.2(a)(1) 2
Section 245a.2(k)(4) 4

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No.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

MARTA ZAMBRANO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 972 F.2d 1122. The opinions of the district court (App., *infra*, 12a-35a, 43a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a(a) and (f), 1182(a)(15) (1988), 1255a(d)(2)(B)(iii) (1988), 1182(a)(4) (Supp. III 1991), and 1255a(d)(2)(B)(iii) (Supp. III 1991) are set forth in the Appendix, *infra*, 75a-81a.

2. 8 C.F.R. 245a.1(i) (1988) and 245a.2(k)(4) (1988) are set forth in the Appendix, *infra*, 81a-82a.

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency, by permitting aliens to apply to the Immigration and Naturalization Service (INS) to adjust their status to that of an alien lawfully admitted for temporary residence. See 8 U.S.C. 1255a. The statute sets out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, those requirements limited relief to aliens who could establish (1) continuous unlawful residence in the United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); (3) admissibility to the United States as an immigrant; and (4) that they filed an application during a 12-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.[1] 8 U.S.C. 1255a(a).

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[1] The Attorney General extended the program as long as possible, designating the 12-month application period to begin on the last permissible day, May 5, 1987, and to continue through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

A key concern of IRCA was to ensure that the adjustment program was limited to a finite period and proceeded in an expeditious manner. Accordingly, as noted above, an express condition for eligibility, set forth in Section 1255a(a)(1), limited relief to aliens who applied in a timely manner; Section 1255a(f)(2) provides that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government."

Section 1255a(f) also established the process for judicial and administrative review of adjustment determinations based on factors other than a lack of timeliness. First, paragraph (1) of Section 1255a(f) makes the statutory procedures exclusive, by providing that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review." Finally, paragraph (4) provides that judicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]."

2. This case involves 8 U.S.C. 1255a(a)(4), which provides that adjustment of status is available only to individuals who were "admissible to the United States as an immigrant." One prohibition on admissibility as an immigrant bars "[a]liens who, in the opinion of the * * * Attorney General at the time of application for admission, are likely at any time to become public charges." 8 U.S.C. 1182(a)(15)

(1988).[2] IRCA mitigated this provision somewhat, by providing that an alien "is not ineligible for adjustment of status * * * due to being inadmissible under section 1182(a)(15) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." Section 1255a(d)(2)(B)(iii) (1988).[3]

In 1987, INS promulgated regulations implementing those provisions. The regulations specified that the determination of whether an alien was likely to become a public charge should include consideration not only of whether the alien himself had received public cash assistance, but also of whether his dependents had. See 8 C.F.R. 245a.1(i) (1988) (defining "public cash assistance" to mean "income or needs-based monetary assistance * * * received by the alien or his or her immediate family members").[4]

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[2] Section 601(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5067, reorganized the conditions of excludability set forth in Section 1182(a) (1988); the analogous condition now appears at 8 U.S.C. 1182(a)(4) (Supp. III 1991).

[3] To conform the provision to revised numbering of the subsections of Section 1182(a), see note 2, *supra*, Section 603(a)(13)(H) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5083, altered the reference to Section 1182 to refer to Section 1182(a)(4). See 8 U.S.C. 1255a(d)(2)(B)(iii) (Supp. III 1991).

[4] A similar provision appeared in the regulation regarding the Attorney General's discretionary power to waive the public-charge bar, which provided that "[a]n alien who has a consistent employment history which shows the ability to support himself and his or her family * * * may be admissible." 8 C.F.R. 245a.2(k)(4) (1988).

3. Respondents initiated this class action in the United States District Court for the Eastern District of California, seeking an injunction ordering INS to cease enforcement of its public-charge regulations, and also ordering INS to readjudicate applications rejected under those regulations. The district court granted a preliminary injunction against INS on August 9, 1988. App., *infra*, 12a-35a. The court first concluded that it had jurisdiction, notwithstanding 8 U.S.C. 1255a(f), because the lawsuit, in the court's view, challenged regulations, rather than "denial of an individual alien's application." App., *infra*, 16a. On the merits, the court concluded that the regulations were likely to be held invalid. *Id.* at 20a-24a. The court then certified two classes of plaintiffs: a class of persons who had filed applications that had been or would be denied on the basis of the challenged regulation, and a class of persons who "had been discouraged from applying" for relief. *Id.* at 25a-26a. With respect to the latter class, the court rejected the government's argument that it was powerless to grant relief to individuals who had failed to file applications in a timely manner. *Id.* at 28a-34a.[5]

After further briefing, the court in July 1989 granted respondents' motion for summary judgment and a permanent injunction. App., *infra*, 43a-64a. The court reaffirmed the jurisdictional holding set forth in its opinion at the preliminary injunction stage. *Id.* at 45a-46a. It also reaffirmed its conclusion that the challenged regulations were invalid. *Id.* at 47a-49a. Accordingly, it granted a permanent in-

[5] The court entered a separate order enforcing its August 9 opinion on September 20, 1988. App., *infra*, 38a-40a.

junction in favor of respondents. See *id.* at 58a-63a (terms of injunction).[6]

4. The court of appeals affirmed. App., *infra*, 1a-11a. With respect to the jurisdictional issue, the court noted that it "recently [had] addressed this [question] in *Catholic Social Services, Inc.* v. *Thornburgh*, 956 F.2d 914 (9th Cir. 1992)," and accordingly affirmed the district court's ruling that it had jurisdiction. App., *infra*, 5a-6a. With respect to the government's contention that the district court erred in granting relief to respondents who had failed to file applications in a timely manner, the court noted that "[t]his court has also recently resolved this precise issue in *Catholic Social Services*." *Id.* at 6a. Noting that "*Catholic Social Services* is the law of the circuit," the panel affirmed the district court. *Ibid.*

REASONS FOR GRANTING THE PETITION

1. The question whether IRCA precluded judicial review in this case is identical to the first question pending before the Court in *Barr* v. *Catholic Social Services, Inc.* (*CSS*), No. 91-1826. In *CSS*, we have argued that "Section 1255a(f)(1) bars review by the district courts of the consistency of * * * [regulations implementing IRCA] with Section 1255a," 91-1826 Pet. Br. at 14-15. If the Court adopts our construction of the statute, then the decision of the court of appeals here would be incorrect, and should be reversed.[7]

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[6] The parties stipulated to a partial stay of the injunction, pending review in the court of appeals. App., *infra*, 67a-74a.

[7] We have provided respondents with a copy of our opening brief in *CSS*.

2. Similarly, the question whether the court of appeals had authority to order INS to grant relief to individuals who did not file timely applications is identical to the second question pending in *CSS*. If the Court accepts our argument that applicants who did not file timely applications "do not, and cannot, fall within the class for whom Congress authorized adjustment of status," 91-1826 Pet. Br. at 16, then the decision of the court of appeals ordering INS to consider applications for adjustment of status filed by individuals who did not file timely applications would be incorrect on this ground as well.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Barr* v. *Catholic Social Services, Inc.*, No. 91-1826, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

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NOVEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15274

D.C. No. CV-88-0455-EJG

MARTA ZAMBRANO; MARGARITA RODRIGUEZ; GRACIELA LOPEZ; ANDREA RUIZ; MARTHA OZUNA; JORGE PERDOMO, PLAINTIFFS-APPELLANTS

v.

IMMIGRATION & NATURALIZATION SERVICE; ALAN NELSON; HAROLD EZELL, DEFENDANTS-APPELLEES

No. 90-15298

D.C. No. CV-88-0455-EJG

MARTA ZAMBRANO, PLAINTIFF-APPELLANT

v.

IMMIGRATION & NATURALIZATION SERVICE, DEFENDANT-APPELLEE

No. 89-16014

D.C. No. CV-88-0455-EJG

MARTA ZAMBRANO; MARGARITA RODRIGUEZ; GRACIELA LOPEZ; ANDREA RUIZ; MARTHA OZUNA; JORGE PERDOMO, PLAINTIFFS-APPELLEES

v.

IMMIGRATION & NATURALIZATION SERVICE; RICHARD L. THORNBURGH, Attorney General of the United States; ALAN NELSON; HAROLD EZELL, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
February 14, 1992—San Francisco, California

Filed August 19, 1992

Before: Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges, and Carl A. Muecke, District Judge.*

Opinion by Judge Wiggins

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* Hon. Carl A. Muecke, Senior United States District Judge for the District of Arizona, sitting by designation.

OPINION

WIGGINS, Circuit Judge:

The Immigration and Naturalization Service ("INS") appeals a permanent injunction issued by the district court ordering it (1) to accept Immigration Reform Control Act [sic] ("IRCA") applications filed after the statutory deadline and (2) to provide a list of aliens whose IRCA applications were denied based on two invalid INS regulations. Appellee cross appeals the denial of its motion for civil contempt based on the INS's alleged failure to comply with the court's injunction. This court has jurisdiction under 28 U.S.C. § 1291. We affirm the judgment of the district court.

BACKGROUND

This case arises out of the INS's administration of IRCA. IRCA was intended to provide long-standing illegal aliens with an opportunity to become legal residents of the United States. There are four basic elements required to qualify for legalization under IRCA. The alien must apply for legalization within the specified time period of May 5, 1987, and May 4, 1988. The alien must establish that he has resided in the United States illegally since January 1, 1982. The alien must establish that he has been present in the United States continuously since the enactment of IRCA on November 6, 1986. Finally, the alien must establish that he is admissible to the United States as an immigrant. If the alien establishes these elements then the alien is eligible to have his status adjusted to that of a temporary resident alien.

Under the fourth element, an alien must establish that he is admissible to the United States as an im-

migrant. An alien is admissible if he does not fall under one of the several existing grounds for exclusion set forth in section 212(a) of the Act. 8 U.S.C. § 1182(a). The exclusion set forth in section 212(a)(15), which precludes admissibility for aliens who are likely at any time to become public charges is the exclusion at issue in this case. Under IRCA, Congress created a special rule with respect to the public charge exclusion. Section 245(d)(2)(B)(iii) [sic] of the Act, 8 U.S.C. § 1255a(d)(2)(B)(iii), provides that an alien who cannot meet the traditional public charge standard is still eligible for legalization if he can demonstrate an employment history in the United States evidencing self support without public assistance. However, even if the alien falls under one of the exclusions, he may still be legalized if he applies for, and the Attorney General grants, a waiver under section 245a(d)(2) of the Act. 8 U.S.C. § 1255a(d)(2).

This case arises out of a class action suit against the INS based on the INS's promulgation of two illegal regulations which unduly restricted the eligibility of illegal aliens for legalization under IRCA. The regulations were related to the public charge exclusion and dealt with "proof of financial responsibility" and "public cash assistance." The district court certified two classes of plaintiffs. Class 1 plaintiffs were those aliens who applied for legalization and were denied based on the application of the illegal regulations. Class 2 plaintiffs were those aliens who were discouraged from applying due to the illegal regulations.

The district court determined that the regulations were inconsistent with the statute and therefore invalid. The court permanently enjoined the INS from

using the regulations in evaluating IRCA applications within the Ninth Circuit. The district court then ordered the INS to process Class 1 applications under the proper public charge standard and to accept and process Class 2 applications under the proper public charge standard. The court based its order with respect to Class 2 on the doctrine of equitable tolling. The district court also ordered the INS to provide a list of the names and addresses of the Class 1 members to the court and the class counsel.

Some portions of the permanent injunction were stayed by agreement of the parties pending appeal. Others were not. The portion of the order requiring the INS to accept and process applications from Class 2 members was not stayed. However, the INS refused to accept applications from alleged Class 2 members who had received noncash public assistance. Counsel for the plaintiffs brought a motion for civil contempt against the INS which was denied by the district court. The court held that the permanent injunction applied only to those aliens who had received public cash assistance. The court subsequently denied a motion for reconsideration and this appeal ensued.

DISCUSSION

I. *Under Catholic Social Services, Section 1255a(f)(1) and (2) Did Not Preclude The District Court From Exercising Jurisdiction In This Case*

This court has recently addressed this jurisdictional issue in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992). In *Catholic Social Services*, the court held that § 1255a(f)(1) and (2) did not bar jurisdiction over collateral challenges to

the practices and procedures of the INS in its administration of IRCA. *Id.* at 921. Therefore, we hold that the district court had jurisdiction to hear this case.

II. *The District Court Did Not Err In Extending The Statutory Time Deadline For IRCA Applications*

This court has also recently resolved this precise issue in *Catholic Social Services*. In that case, the court held that a district court could properly extend the statutory deadline for applications under IRCA. The court found that the government's reliance on *INS v. Pangilinan*, 486 U.S. 875 (1987), was misplaced as the district court did not order naturalization of the plaintiffs but simply extended the applications deadline. The court also noted that its case differed from *Pangilinan* in that the extension of the IRCA application deadline effectuated rather than frustrated the public policy established by Congress under IRCA. Thus, the court affirmed the district court's extension of the deadline. *Catholic Social Services*, 956 F.2d at 921-23.

We are presented with the same question in this case: whether a district court may properly extend the statutory deadline for IRCA applications. *Catholic Social Services* is the law of the circuit. Therefore, we affirm the district court.

III. *The District Court Did Not Err In Ordering The INS To Produce The Names Of All Class 1 Plaintiffs*

IRCA contains a confidentiality provision which prohibits the publication or use of information furnished pursuant to an IRCA application. 8 U.S.C. § 1255a

(c)(5). The confidentiality provision was enacted to encourage illegal aliens to come forward and apply for legalization. Its purpose was to assuage the fear that the government might utilize the information provided to deport applicants. The provision was intended, therefore, to shield the information provided from the Attorney General and other governmental entities. As the district court pointed out, the provision was not intended to be a confidentiality provision at all, but rather a prohibition against the use of the information by the government to prosecute, deport or otherwise penalize illegal aliens who applied for legalization. H.R. Rep. No. 682(I), 99th Congress 2d. Sess. 73 (1986), *reported in* 1986 U.S.C.C.A.N. 5649, 5677.

The INS argues that the provision acts as a complete bar to the disclosure of the names to the district court and class counsel. The INS relies primarily on *Baldrige v. Shapiro*, 455 U.S. 345 (1982), to support its argument. As will be shown below, the INS's reading of both the confidentiality provision and *Baldrige* is incorrect.

The confidentiality provision is not violated by the court ordered discovery of the names of the Class 1 plaintiffs. There are three forms of confidentiality provisions which have been utilized by Congress. *See Association for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. 1977). First, there are provisions which expressly bar disclosure in legal proceedings. *See e.g.*, 45 U.S.C. § 41 (railroad accident investigation reports may not be disclosed). Second, there are provisions which expressly allow for disclosure in legal proceedings. *See* e.g., 8 U.S.C. § 1202 (f) (state department visa records may be disclosed to a requesting court). Finally, there are those pro-

visions which are silent on the issue of disclosure during legal proceedings. *See e.g.*, 8 U.S.C. § 1160(b)(6) (prohibiting disclosure of information in SAW applications under IRCA without addressing issue of disclosure in a legal proceeding). The confidentiality provision at issue here is of the third variety.

The Supreme Court has held that statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961). The Court stated that courts should avoid construing a confidentiality provision so that it would "suppress otherwise competent evidence unless the statute, strictly construed, requires such a result." *Id.* at 218.

In *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), the D.C. Circuit in applying *St. Regis* stated that "where Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language." *Id.* at 1351. This reading of *St. Regis* has also been applied by the Eleventh Circuit in *In re Nelson*, 873 F.2d 1396 (11th Cir. 1989). In *Nelson*, the Eleventh Circuit addressed the question of whether the confidentiality provision for SAW applications, another IRCA confidentiality provision, prohibited judicial disclosure. The court held that the statute did not prohibit judicial disclosure as it contained no specific language barring such a disclosure. Therefore, the court ruled that the district court did not err in ordering disclosure of application information to an aliens' counsel. *Id.* at 1397. As in *Nelson*, the provision at issue here does not specifically prohibit judicial disclosure. We agree with the D.C. Circuit and the Eleventh Circuit and hold that the district court's order did not violate section 1255a(c)(5).

The INS claims that *Baldrige v. Shapiro*, 455 U.S. 345 (1982) is controlling in this case. The INS's reliance on *Baldrige* is inapposite. The confidentiality provision in *Baldrige* is similar to the one at issue in this case. However, there is one critical difference. The provision in *Baldrige* contains an express prohibition against the production of Census information in judicial proceedings. 13 U.S.C. § 9(a). Thus, *Baldrige* falls squarely within the exception the Court identified in *St. Regis*. The Court stated that judicial disclosure may be prohibited where the statute expressly requires such a result. While the statute in *Baldrige* does specifically require such a result, the IRCA provision at issue here has no specific language prohibiting judicial disclosure. Furthermore, the purpose of the IRCA confidentiality provision is "to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." 1986 U.S.C.C.A.N. 5677. Thus, the district court was correct that because "plaintiffs in this case are the aliens whose interests are protected by the statute, . . . [p]roviding the names of class members to class counsel facilitates, rather than frustrates, the legislative intent of the statute." Therefore, *Baldrige* is not applicable to this case, and the district court did not err in ordering the INS to produce the names of the Class 1 plaintiffs.

IV. *The District Court Did Not Err In Denying The Request For A Contempt Order*

The district court properly denied the plaintiffs' motion for a contempt order. The plaintiffs argue that the court erred as a matter of law in construing its own injunction to limit relief only to those Class 2

plaintiffs who received public *cash* assistance. The plaintiffs claim that the injunction granted relief to all illegal aliens who were discouraged from submitting an IRCA application on the basis that they had received any form of public assistance. Such a construction of the order is not supported by the record.

The record reveals that the claimed illegal regulations promulgated by the INS were all directed at illegal aliens who had received public *cash* assistance. The language used in each of the challenged regulations specifically referred to public *cash* assistance. *See* 8 C.F.R. § 245a.2(d)(4) (alien must show a history of employment without the receipt of public *cash* assistance); 8 C.F.R. 245a.1(i) (income or needs-based monetary assistance to include, but not be limited to, supplemental security income received by alien through federal, state or local programs designed to meet subsistence levels is public *cash* assistance). The plaintiffs are correct in noting that the district court order used the general term "public assistance" without identifying whether that included noncash assistance. However, read in the context of the whole case, it is clear that the term "public assistance" as used in the injunction was intended to refer only to public *cash* assistance because the challenged regulations only referred to public cash assistance. Therefore, the court did not err in construing its injunction and denying the contempt motion.

CONCLUSION

This court has jurisdiction to consider this matter under our holding in *Catholic Social Services*. The district court did not err in extending the deadline for IRCA applications. The district court did not err in

ordering discovery of the names of the Class 1 plaintiffs as the statute does not specifically prohibit judicial discovery as required by *St. Regis*. Finally, the district court did not err in denying the contempt motion as it correctly construed its injunction to be limited to Class 2 plaintiffs who had received public *cash* assistance.

Therefore, the judgment of the district court is hereby AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. No. S-88-455 EJG

MARTA ZAMBRANO, MARGARITA RODRIGUEZ, GRACIELA LOPEZ, ANDREA RUIZ, MARTHA OZUNA, and JORGE PERDOMO, for themselves and for all others similarly situated, PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

[Filed Aug. 9, 1988]

This matter was before the court on May 3, 1988 for hearing on plaintiff's motions for preliminary injunction and class certification. Beth Zacovic, Pauline Gee, Jennifer Wright and Susan Balliet appeared on behalf of plaintiffs. Robert Kendall, Eileen Corty, Sharon Greenspan, Special Assistant U.S. Attorney Glyndell Williams and Assistant U.S. Attorney Greg Hollows appeared on behalf of defendants. After hearing the arguments of counsel, the court requested additional briefing and ordered the matter submitted upon receipt of the briefs. Now, having read and considered all the materials filed by the parties, the court makes the following findings and conclusions.

This lawsuit was filed April 12, 1988 by six named plaintiffs, all of whom are illegal aliens, on behalf of themselves and all others similarly situated, seeking to enjoin the defendants from applying allegedly illegal regulations. Plaintiffs are members of classes of persons whose applications for legalization ("amnesty") were recommended for denial or who were discouraged from applying for amnesty based on defendants' implemenation of the alleged illegal regulations.

Plaintiffs' class action lawsuit seeks declaratory and injunctive relief and poses a constitutional challenge to regulations promulgated by the Immigration and Naturalization Service ("INS") which implement the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). IRCA was signed into law in November 1986 and reflects an attempt by Congress to reform the nation's immigration laws. Generally speaking, the legislation had two main objectives: 1) reduction of undocumented aliens by imposing employer sanctions, thereby reducing the attractiveness of employment in this country; and 2) stabilizing the status of undocumented aliens already living in the United States by offering a broad legalization or amnesty program. This lawsuit concerns one aspect of the legalization program. In order to be eligible for amnesty, an alien must satisfy four requirements: 1) a timely application [1]; 2) unlawful residence in the United States since 1982; 3) continuous presence in the United States since IRCA's

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[1] The "window" provided by IRCA for amnesty applications was intended to extend twelve months, from May 5, 1987 through May 4, 1988.

enactment; and 4) admissibility as an immigrant. *See* 8 U.S.C.A. § 1255a(a)(1-4) (West Supp. 1988).

Plaintiffs' lawsuit challenges regulations directed at the admissibility standards under § 1255a(a)(4). At issue is the test for determining whether an alien is "likely to become a public charge". Such a finding is grounds for exclusion under the Immigration and Nationality Act ("INA") and continues in effect under the legalization provisions of IRCA. *See* 8 U.S.C.A. § 1182(a)(15) and 8 U.S.C.A. § 1255a(d)(2)(iii) [sic] (West Supp. 1988). However, according to plaintiffs, what has changed is the basis on which the public charge determination is made. Section 1182(a)(15) provides in pertinent part: "Except as otherwise provided in this chapter, the following classes of aliens . . . shall be excluded from admission into the United States: . . . aliens who, . . . in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges."

One factor considered in determining whether an alien is likely to become a public charge is the alien's past or present receipt of welfare benefits. The gist of plaintiffs' complaint is that, traditionally, the receipt of welfare, by itself, does not establish a public charge finding. Instead, public charge determination is a prospective test based on the totality of the circumstances existing at the time of the alien's application for legalization. *See Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) ("the fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge").

Plaintiffs allege that the legalization provisions of IRCA incorporate the pre-existing standards of § 1182(a)(15) and have, in effect, liberalized the

public charge test. The "Special Rule for determination of public charge" embodied in IRCA provides:

> An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this Title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 U.S.C.A. § 1255(a)(2)(B)(iii) (West Supp. 1988). Simply stated, plaintiffs argue that this language suggests a two-tiered evaluation. First, the public charge determination is made under § 1182(a)(15), employing the traditional totality of the circumstances test. If the alien is found ineligible under § 1182(a)(15), an alternative, second step comes into play under the "Special Rule," quoted above. This second tier allows an alien already deemed likely to become a public charge under § 1182(a)(15) to overcome that barrier to admissibility by demonstrating a "history of employment in the United States evidencing self-support without receipt of public cash assistance." § 1255a(d)(2)(B)(iii), *supra*.

At issue in this case is whether regulations implemented by defendants which purport to interpret the legalization provisions of IRCA are invalid since they appear to impose stricter standards on aliens than the statute itself. According to plaintiffs, one of the challenged regulations, entitled "Proof of Financial Responsibility," attempts to replace the two-tiered process of the statue with a single, more restrictive standard. *See* 8 C.F.R. § 245a.2(d)(4) (1988). Another regulation defines public cash assistance to include money received by the alien *or* his family members. *See* 8 C.F.R. § 245a.1(i) (1988). Plaintiffs argue

that this policy of attributing other family members' income to the alien for purposes of making the public charge determination violates IRCA.

Plaintiffs also seek certification of two Ninth Circuit wide classes of persons who have been affected by defendants' regulations. Proposed relief includes invalidating the regulations, reconsideration of all applications whose denials were based on these regulations, and extension of the application deadline to allow class members who were discouraged from applying an opportunity to apply.

Before responding to the merits of plaintiffs' motions, the court must address defendants' motion to dismiss, which, although not properly calendared for hearing, has been addressed by plaintiffs and is appropriate for resolution at this time. Defendants contend this case is not justiciable, that some plaintiffs lack standing to sue and that the case is not ripe for review as to other plaintiffs. In addition, defendants assert that plaintiffs' failure to exhaust administrative and statutory review procedures precludes judicial review.

Exhaustion

Defendants contend that judicial review is inappropriate unless and until plaintiffs' applications for legalization are denied. Furthermore, when entertained, judicial review of application denials should be concurrent with similar review of deportation orders. *See* 8 U.S.C.A. § 1255a(f) (West Supp. 1988). Defendants argue that since exclusive review of deportation orders lies with the courts of appeal, jurisdiction in this court is inappropriate. These contentions are not persuasive since plaintiffs' lawsuit is not challenging denial of an individual alien's application, nor is it seeking review of a deportation order.

Plaintiffs' lawsuit is challenging the validity of regulations implemented and enforced by defendants. This court has jurisdiction to review such a claim under 28 U.S.C. § 1331. *See e.g., National Center for Immigration Rights v. Immigration and Naturalization Service*, 743 F.2d 1365, 1369 (9th Cir. 1984) (hereafter *NCIR v. INS*). In addition, 8 U.S.C. § 1329 confers jurisdiction on the district courts of all causes of action arising under Subchapter II of the INA, in which § 1255a is contained. Moreover, because this is not a challenge to an agency order denying an individual application for legalization, the statutory requirements of IRCA providing for limited judicial review are inapplicable. In addition, the doctrine of exhaustion is not jurisdictional but is a matter within the court's discretion. *See Kale v. United States*, 489 F.2d 449 (9th Cir. 1974).

Ripeness

Although raised as a separate issue, ripeness seems to be a re-characterization of defendants' exhaustion argument. Defendants contend that three of the named plaintiffs have filed applications which, if denied, should be administratively appealed. Defendants argue that, pending final administrative action on these plaintiffs' applications, judicial review is premature.[2]

These arguments misconstrue the nature of plaintiffs' complaint. Plaintiffs have not asked the court to insert its judgment for that of the INS and grant

[2] At the hearing on May 3, 1988 plaintiffs stated that five of the six named plaintiffs had filed applications and the remaining plaintiff was expected to file prior to the May 4, 1988 deadline.

plaintiffs temporary resident status. Rather, the ultimate relief sought in this lawsuit is a declaration that the challenged regulations are invalid. The regulations plaintiffs challenge have been in place since May 1, 1987 and are currently being enforced. Defendants have not indicated a willingness to disregard or modify these regulations.[3] Therefore, this case is ripe for review. *See NCIR v. INS, supra* at 1369 (challenge to agency regulation is fit for decision if "the regulation is presently being enforced and is unquestionably final").

Standing

Defendants contend that plaintiffs who have not yet applied for legalization have not been injured and therefore have no standing to sue. At the time defendants' brief was filed raising this issue, several named plaintiffs had not filed applications. However, at the hearing on May 3, 1988, counsel for plaintiffs represented to the court that five of the six named plaintiffs had filed applications and that the remaining named plaintiff was expected to file by May 4, 1988. To the extent all named plaintiffs have made application, the issue of standing is moot. However,

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[3] The court notes that defendants apparently have reached some concession regarding enforcement of these regulations in a similar lawsuit. *See Perales v. Meese*, No. 88-265 KC (S.D.N.Y. April 27, 1988) (Lexis, Genfed Library). In denying a motion for preliminary injunction, Judge Conboy stated that the INS had conceded ambiguity in its regulations, had taken steps to clarify the meaning of public charge and was attempting to locate applicants "who were erroneously excluded under the more restrictive 'public charge' standard." *Id.* However, in this lawsuit, defendants have not made any such concessions nor taken any such corrective measures to the court's knowledge.

the issue will be analyzed to the extent one of plaintiffs' proposed classes contains persons who have not yet filed applications.[4]

The elements of standing include an actual or threatened injury which is traceable to defendants' conduct and which is likely to be redressed by a favorable judicial decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Plaintiffs who have yet to file an application have alleged a threatened injury if they can demonstrate that their reliance on defendants' alleged invalid regulations resulted in their failure to file applications by the May 4, 1988 deadline. While the complaint and supplemental affidavits allege that defendants' conduct caused the injuries complained of, persons seeking to join this class will have to demonstrate that they were otherwise eligible for adjustment of status but for implementation and enforcement of the challenged regulations.

Unless plaintiffs are allowed to sue to invalidate the regulations, they will lose their legal entitlement under IRCA to have their status changed from aliens, to aliens lawfully admitted for temporary residence. *See* 8 U.S.C.A. § 1255a(a) (West Supp. 1988). In terms of actual or threatened injury, this translates into an inability to work legally in this country and a constant threat of deportation. Therefore, the court finds that class members who have yet to file applications and who are able to meet the rigorous standards of proof necessary for class membership, have standing to sue since there is a causal link between plain-

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[4] The court's ability to afford relief to class members who have not applied by May 4, 1988 raises a separate issue which is discussed at pages 18-24, *infra*.

tiffs' threatened injuries and defendants' conduct which is likely to be remedied by the court if plaintiffs prevail on the merits.

Plaintiffs' Motion for Preliminary Injunction

The standards in the Ninth Circuit for a preliminary injunction require the moving party to show either: 1) a strong likelihood of success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Los Angeles Memorial Coliseum v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). Plaintiffs meet their burden under the first prong.

The Merits

It is clear that, to be valid, regulations have to be consistent with the statute under which they were promulgated. *United States v. Larionoff*, 431 U.S. 864 (1977). In addition, an agency's interpretation of a statute cannot supercede [sic] the language chosen by Congress. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

The primary regulation challenged by defendants, Proof of Financial Responsibility, 8 C.F.R. § 254a.2 (d)(4), provides in pertinent part:

> An applicant for adjustment of status . . . is subject to the provisions of section [1182(a)(15)] . . . unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

Plaintiffs contend that this regulation facially conflicts with the language of 8 U.S.C. § 1255a(d)(2)(B)(iii), the statutory provision the regulation is supposed to implement. Application of the regulation seems to short cut the statutory two-tier process for making the public charge determination. Plaintiffs' argument that the statute requires a finding of inadmissibility under the traditional standards of § 1182(a)(15) before evaluating an alien's employment history and receipt of public assistance, is persuasive. The language of the regulation makes no such allowance and seems to indicate that the public charge determination will be based solely on an alien's past receipt of public assistance and his employment history in the United States.

The court is loath to interfere with an agency's interpretation of a statute that the agency was authorized to administer. *See generally, INS v. Cardoza Fonseca*, 107 S.Ct. 1207, 1220-22 (1987); *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Moreover, Congress expressly delegated authority to the INS, through the Attorney General, to create the regulations which plaintiffs now challenge. *See* 8 U.S.C.A. § 1255a(g). In such a situation, it is inappropriate for the court to substitute its own statutory interpretation for that of the agency. *See Chevron*, 467 U.S. at 842; *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981).

Clearly, the INS is entitled to deference. However, reciting that standard of judicial review does not resolve the question of whether, under such a deferential standard, the INS has complied with its congressional mandate. It is axiomatic that a court cannot defer to an agency's regulation where that regu-

lation conflicts with the statute it is supposed to implement. *See State of Washington v. Bowen*, 815 F.2d 549, 554 (9th Cir. 1987); *Vista Hill Foundation, Inc. v. Heckler*, 767 F.2d 556, 559-60 (9th Cir. 1985). Where the agency's interpretation of a statute, as evidenced by its regulations, is inconsistent with a statutory mandate or frustrates congressional policy, the court must enforce the statute notwithstanding the agency's interpretation. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

The legislative history of IRCA seems to support the conclusion that Congress intended to incorporate traditional standards for excludability under § 1182 (a)(15) into IRCA. The purpose of the Special Rule for Public Charge Determination set forth in the statute was "to incorporate in the language of the bill a provision which demonstrates more flexibility than we have historically had in connection with the application of the immigration law." 130 Cong. Rec. H5908 (daily ed. June 15, 1984) (statement of Rep. Brown). Congress intended the "legalization program [to] be implemented in a liberal and general fashion . . . and expects the INS to incorporate flexibility into the standards for legalization eligibility . . ." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5676-77.

Plaintiffs also urge the court to give only limited deference to defendants' regulations because of the inconsistent positions taken by the INS and the various clarifications issued concerning the challenged regulations. From the time the regulations took effect on May 1, 1987, INS has "clarified" its interpreta-

tion of their meaning at least three times.[8] These clarifications add support to plaintiffs' argument concerning the invalidity of the regulations. For example, the Slattery letter states that although alien-applicants receive AFDC payments on behalf of their United States citizen children, the parents are *not* considered to have received public cash assistance, nor is public charge status conveyed to them in this situation. The letter contains similar statements regarding attribution of Social Security Income ("SSI"). Yet the regulation which defines public cash assistance states that the term includes needs based monetary assistance and SSI received by the alien *or* his family members. *See* 8 C.F.R. § 245a.1(i) (1988).

This inconsistency in INS' position combined with plaintiffs' declarations that they were either discouraged from applying for legalization or in fact had their applications recommended for denial based solely on their receipt of AFDC or SSI payments on behalf of their United States citizen children, indicates that otherwise eligible applicants may have been denied a benefit to which they were entitled due to defend-

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[8] On September 23, 1987, INS, through its National Commissioner, Richard Norton, issued a memo entitled "Guidelines for Determining Public Charge Issues under the Legalization Provisions of [IRCA]", the stated purpose of which was to "clarify the standards" for the public charge determinations (hereafter referred to as "Norton memo #1). On February 12, 1988 additional clarifications appeared in a letter written by William Slattery, INS' Assistant Legalization Commissioner. The letter provides a detailed discussion of the definition of "Public Cash Assistance" (hereafter referred to as "Slattery letter"). Finally, on April 21, 1988, INS issued a memo entitled "The Effect of the Receipt of AFDC Benefits on Eligibility for Legalization" (hereafter referred to as "Norton memo #2").

ants' conduct. Based on the foregoing, the court concludes that plaintiffs have demonstrated a likelihood of success on the merits.

Irreparable Injury

Plaintiffs' proposed preliminary injunction seeks to: 1) enjoin defendants from applying the allegedly invalid regulations to pending applications; 2) order defendants to reconsider applications previously recommended for denial; and 3) continue taking applications from those who were previously discouraged from filing applications. If the preliminary injunction is not issued pending a trial on the merits, plaintiffs claim they will be denied the right to work legally in this country, and will face a constant threat of deportation.

Defendants argue that court intervention at this stage is unnecessary since IRCA itself provides a mechanism for relief. Defendants contend that plaintiffs whose applications were recommended for denial can apply for a waiver of the public charge provision. *See* 8 U.S.C.A. § 1255a(d)(2)(B)(i) (West Supp. 1988). This argument is not persuasive. First, it does not address the class of plaintiffs who were otherwise eligible for amnesty but who nonetheless failed to file applications in reliance on the alleged restrictive interpretation of the statute as contained in the regulations. Second, as plaintiffs point out, the granting of waivers is discretionary, unlike the legal entitlement for adjustment of status contained in § 1255a(a), and provides no assurance that plaintiffs' applications will be granted. Third, as discussed and rejected earlier, the availability of administrative review under IRCA for denials of applications is not

the issue in this case. Plaintiffs contend that the irreparable harm lies in the continued enforcement of allegedly invalid regulations. Pursuing administrative remedies is a course of action open to only some of the plaintiffs and will not remedy the situation, but will merely delay the harm as long as defendants continue to apply the challenged regulations. Although in a similar lawsuit defendants have apparently conceded the ambiguity in the regulations and are making attempts to "locate applicants who were erroneously excluded under the more restrictive 'public charge' standard," *Perales, supra*, they have made no such concession in this case and, to the court's knowledge, their position remains unchanged from that stated at the hearing on May 3, 1988 which was that no inconsistency exists between the statute and the regulations and that the regulations are a correct interpretation of the statute.

The Ninth Circuit has previously held that the hardship to an alien from being unable to work to support oneself and one's family is beyond question. *See NCIR v. INS*, 743 F.2d at 1369. *See also, Catholic Social Services v. Meese*, 664 F. Supp. 1378, 1388 (E.D. Cal. 1987). Plaintiffs have made a showing of irreparable harm and the motion for preliminary injunction is granted.

Plaintiffs' Motion for Class Certification

Plaintiffs seek to certify two classes of persons defined below. The court has modified the class definitions to comport with the statements made by counsel at the May 3rd hearing.

1. All persons residing within the Ninth Circuit whose applications for legalization, filed

between May 5, 1987 and May 4, 1988, have been or will be denied on the basis that they are likely to become a public charge.

2. All persons residing within the Ninth Circuit who were otherwise eligible for adjustment of status under 8 U.S.C. § 1255a but who had not applied for legalization by May 4, 1988 because they had been discouraged from applying by the INS or by any qualified designated entity ("QDE") because of the regulations defining Proof of Financial Responsibility and Public Cash Assistance.

Initially, the court notes that plaintiffs are properly moving for certification at this time. The Ninth Circuit has held that in the absence of class certification, a preliminary injunction only covers named plaintiffs. *NCIR v. INS*, 743 F.2d at 1371.

Proposed Class No. 1

Proposed class no. 1 meets the prerequisites of Fed. R.Civ.P. 23(a) and, in addition, meets the definition of class under Fed.R.Civ.P. 23(b)(2) for the reasons discussed below. Although the exact size of the class is unknown, plaintiffs estimate that it encompasses approximately 4000 persons. The May 3rd and May 12th, 1988 declarations of Joseph Thomas, director of the INS' western regional processing facility, which attempt to show that the actual size of the class is deminimus [sic], are not compelling reasons to deny class certification. Rule 23 provides for modification of certification orders and decertification of class actions if additional information is gleaned which makes class relief inappropriate. According

to plaintiffs, INS is still processing applications, thus the total number of denials based on public charge grounds is unknown. If new information reveals that the number of persons effected is sufficiently small to make joinder possible, the class can be decertified. The typicality and commonality prerequisites are also met since the legal issue raised—the validity of the regulations—is the same for every class member. Adequacy of representation is also satisfied since the named plaintiffs have interests identical to those of the class as a whole. The second component of adequate representation concerning the qualifications of plaintiffs' attorneys, is not disputed.

The proposed class definition also meets the requirements of Fed.R.Civ.P. 23(b)(2), that is, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.* In this case, plaintiffs have demonstrated that defendants have acted or will act consistently toward all class members by applying and continuing to apply the challenged regulations. In other words, plaintiffs have shown that an established regulatory scheme has or will be applied to all class members.[6] Defendants' actions have not been shown to be so individualized or varied as to make the relief sought valid as to some members of the class and invalid as to others. In sum, certification of proposed class no. 1 is appropriate at this time.

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[6] Defendants have failed to contradict plaintiffs' evidence on this point, notwithstanding the concessions apparently made by defendants in *Perales*. *See* footnote 3, *supra*.

Proposed Class No. 2

At the hearing on May 3, 1988, the court questioned the parties about the court's ability to grant relief to plaintiffs who had not and would not file their applications by the May 4, 1988 deadline. Since neither party had addressed the issue in their initial briefs, additional briefing was requested. After reviewing the materials submitted by the parties, the court finds that it does have the power to grant relief to class members who, in reliance on defendants' regulations, were discouraged from applying for legalization by the INS or any qualified designated entity ("QDE")[7] and who failed to file an application by May 4, 1988, and who otherwise would have been eligible for adjustment of status. However, the standards of proof required to show membership in this class must, by necessity, be stringent.

Defendants contend that this court does not have jurisdiction as to plaintiffs who had not applied for legalization as of May 4, 1988. To the extent all named plaintiffs have submitted applications by May 4, 1988, the question of this court's jurisdiction is moot. However, plaintiffs' proposed class no. 2 includes persons who were discouraged from applying and therefore, persons who failed to apply by the May 4th deadline. Defendants take the position that the statutorily imposed time limit for filing applications operates to bar anyone who failed to file by May 4, 1988. Defendants claim the deadline is juris-

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[7] Congress selected certain organizations, known as qualified designated entities (QDE), to assist aliens in the application process. *See generally*, 8 U.S.C.A. § 1255a(c)(1-4) (West Supp. 1988) and 8 C.F.R. 245a.1(1) (1988).

dictional and, unlike exhaustion, is a requirement which cannot be waived.

The court finds itself in a quandary concerning defendants' position on the issue. In their briefs and argument before *this* court, defendants firmly adhered to the position that the court has no authority to certify a class containing persons who did not submit timely applications. Yet, in a similar lawsuit involving the same defendants, virtually identical factual and legal issues, and seeking similar relief, defendants reach a seemingly contradictory conclusion. In *Perales, supra*, Judge Conboy based his decision to deny preliminary injunctive relief on, in part, defendants' concessions concerning availability of relief after a determination on the merits.

> It is now clear that persons who may have been disqualified after having applied, or were discouraged from applying by qualified designated entities (QDEs) . . . may now have a wholly new basis to apply based on these clarifications. *Because the government concedes that the Commissioner has authority*, under conventional administrative powers, *to find that constructive filing has occurred* with respect to such applicants *after the expiration of the amnesty period on May 4, 1988*, . . . intervention at this time is not necessary.

Perales, supra (emphasis added). Although the basis for the government's concession in *Perales* is not explained in detail, Judge Conboy's finding seems imminently [sic] relevant to this case and worth further exploration.

Plaintiffs suggest that this court's equitable powers are broad enough to fashion a remedy encom-

passing the requested relief. *See Pangilinan v. INS*, 786 F.2d 1091 (9th Cir. 1986), *rev'd* —— U.S. ——, No. 86-1992 (June 17, 1988). However, plaintiffs' reliance on *Pangilinan*, as support for this argument is misplaced in light of the Supreme Court's recent reversal of the Ninth Circuit.[8] Alternatively, plaintiffs argue that the one year time limit imposed by IRCA is akin to a statute of limitations and can be tolled. *See Bowen v. City of New York*, 106 S.Ct. 2022 (1986). The Supreme Court approaches the problem of determining whether a time limitation requirement is jurisdictional by analyzing the structure of the statute, the underlying congressional policy and the reasoning of prior cases. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Section 1329 of Title 8 of the United States Code gives district courts jurisdiction over all actions arising under the provisions of the subchapter in which that section is contained. Section 1255a is within that subchapter. Nothing in § 1255a conditions jurisdiction under § 1329 on timely filed applications. Moreover, the timely application provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes*, 455 U.S. at 393. Therefore, the statutory structure itself does not support defendants' argument that a timely filed application is a jurisdictional prerequisite.

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[8] The Supreme Court's decision in *Pangilinan* to reject a court's invocation of its equitable powers to confer citizenship on aliens who failed to meet congressionally mandated filing deadlines does not adversely affect this court's decision to apply the doctrine of equitable tolling. That issue was not addressed in *Pangilinan* nor was the relief sought the same as in this case.

On the other hand, the congressional policy underlying the one year time limit for receiving legalization applications clearly demonstrates that Congress intended a "one time only" amnesty program limited to twelve months. However, the thrust of plaintiffs' lawsuit is that applicants who were discouraged from applying by reliance on allegedly illegal regulations have been denied the twelve month application period Congress intended. Plaintiffs' opening and supplemental briefs contain numerous exhibits detailing the many changes and clarifications defendants have made since the regulations were first adopted regarding the definition of public cash assistance. In fact, the latest such clarification embodied in Norton memo #2 was not disseminated to INS regional offices until April 21, 1988, less than two weeks prior to the filing deadline. Plaintiffs also submit declarations of many QDE staff members who state their reliance on the May, 1987 regulations in counseling aliens whether or not to apply for amnesty.

If plaintiffs can prove the allegations of their complaint, it appears that Congress' intent to provide a one year window for receipt of amnesty applications will have been frustrated by the interpretations given the regulations prior to the recent clarifications. If more people are eligible for admission based on the clarifications than would have been prior to their recent dissemination, it seems clear that congressional intent will be furthered, not abrogated, by tolling of the May 4, 1988 filing deadline.

The final factor in the analysis of whether a time limitation is jurisdictional, is the reasoning of prior cases. Unfortunately, because of the recent enactment of IRCA, case authority is not extensive. However, at least three courts have pending cases which

challenge the validity of regulations implemented under IRCA. In *Perales v. Meese, supra,* the court found that plaintiffs who ultimately prevail on the merits may be entitled to relief from the May 4th deadline under the equitable tolling doctrine. In *Ayuda v. Meese,* No. 88-625 (D.D.C. May 4, 1988) Judge Sporkin allowed plaintiffs in specified situations who can demonstrate their failure to file by May 4, 1988 was due to action or inaction of the INS or QDEs, until August 31, 1988 to seek judicial relief. On June 10, 1988, Judge Karlton of this district ordered the INS to accept legalization applications through November 30, 1988 from certain class members covered by the court's previous orders. *Catholic Social Services v. Meese,* No. 86-1343 LKK (E.D. Cal. June 10, 1988). In none of these cases do the courts question their jurisdiction to adjudicate claims by persons whose amnesty applications were filed after the statutory deadline.

The analysis above demonstrates that the timely application language of § 1255a should not be construed as a jurisdictional bar and is instead subject to the principles of equitable tolling. Furthermore, equitable tolling is consistent with Congress' intent in enacting § 1255a and "does not undermine the purpose of the [one year] limitations period when viewed in connection with the underlying statute." *See Bowen v. City of New York,* 106 S.Ct. 2022, 2030 (1986).

The fact that Congress may have been aware of litigation concerning the validity of INS regulations when it considered and rejected the bill to extend the May 4th deadline does not affect this court's jurisdiction. In fact, one of the reasons offered in opposition to the extension was the inherent equitable pow-

ers of the court to remedy the situation should it find the need to do so.

> [T]he proponents [of the extension bill] argue that certain court decisions recently handed down now make some 75,000 persons eligible for the legalization program. There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well equipped to evaluate equitable considerations.

134 Con. Rec. S5041 (daily ed. April 28, 1988) (statement of Sen. Grassley).

In this case, "the equities in favor of tolling are compelling." *See Bowen v. City of New York*, 106 S.Ct. at 2030. Plaintiffs allege they were discouraged from applying by the INS and its selected representatives. All class members who relied on this information had no reason to doubt its veracity. It would be unfair to deny adjustment of status under IRCA to those who are otherwise entitled to it but for the actions of defendants.

In addition, class no. 2 meets the requirements of Fed.R.Civ.P. 23(a) for essentially the same reasons as class no. 1 with two exceptions. If, in fact, all named plaintiffs have applied for amnesty by May 4, 1988, proposed class no. 2 has no class representative. However, plaintiffs have informed the court of their intent to amend the complaint to add a class representative for the second class. Should plaintiffs fail to take this action or should their motion to amend be denied, the preliminary injunction is subject to modification to delete proposed class no. 2. In addition, plaintiffs allege the second class is even larger than the first, thus satisfying the numerosity require-

ment. Once again, the court notes that should information come to light in the future which makes joinder of all class members feasible, modification or decertification may be appropriate. Accordingly, plaintiffs motion for certification of class no. 2 is granted.

ORDER

The parties are instructed to meet and confer concerning the structure of an order implementing the court's decision. A joint proposed order shall be filed within 20 days of the date of this memorandum opinion. The order should enjoin defendants from applying the challenged regulations to all applications which have been filed but not yet acted upon. In addition, the order should require defendants to establish a procedure for identifying all members of class no. 1 whose applications were denied or recommended for denial based on a finding that they were likely to become a public charge as determined by application of the regulations defining proof of financial responsibility, 8 C.F.R. § 245a.2(d)(4), and public cash assistance, 8 C.F.R. § 245a.1(i). These class members should be notified that their applications will be re-opened and may be reconsidered based on defendants recent "clarifications" of the challenged regulations. The order should also suggest procedures for identifying members of class no. 2 as well as criteria for establishing strict evidentiary requirements and standards of proof to be imposed on these persons in order to demonstrate their right to relief under the terms of the lawsuit should plaintiffs prevail on the merits. The court is not inclined to grant further preliminary relief to proposed class no. 2 until it is satisfied that these evidentiary requirements will be effective in identifying potential class members.

In addition, the court orders that plaintiffs are not required to post a bond or other security during the pendency of this action. Plaintiffs are indigent and have previously been granted *in forma pauperis* status. Requirement of security in such a situation is within the court's discretion. *See People ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, *modified on other grounds*, 755 F.2d 998 (9th Cir. 1985).

IT IS SO ORDERED.

DATED: August 9, 1988.

/s/ Edward J. Garcia
EDWARD J. GARCIA
Judge
United States District Court

CERTIFICATE OF SERVICE

CIV-S-88-455-EJG

ZAMBRANO, ET AL

v.

INS, ET AL

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on 8-9-88, I served a copy of the attached ORDER by placing said copy in a postage paid envelope addressed to the person hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California, or by placing said copy into an inter-office delivery receptable [sic] located in the Clerk's Office.

Served by Mail:

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EDWARD J. GARCIA

J.R. GRINDSTAFF
Clerk

By: /s/ P. Nelson
P. NELSON
Deputy

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. No. S-88-455-EJG

MARTA ZAMBRANO, MARGARITA RODRIGUEZ, GRACIELA LOPEZ, ANDREA RUIZ, MARTHA OZUNA, and JORGE PERDOMO, for themselves and for all others similarly situated, PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, RICHARD THORNBURGH, ET AL., DEFENDANTS

ORDER

[Filed Sep. 20, 1988]

Pursuant to the court's preliminary injunction and memorandum opinion of August 9, 1988 and after considering the proposed orders submitted by the parties, the court enters the following order.

1. Defendant's motion to dismiss is denied.

2. Plaintiffs' motion for preliminary injunction is granted.

3. Plaintiffs' motion for class certification is granted as to Class No. 1 and is provisionally granted

as to Class No. 2, subject to successful amendment of the complaint to add a class representative.

4. Defendants are enjoined from applying 8 C.F.R. §§ 245a.1(i) and 245a.2(d)(4) to all legalization applications within the Ninth Circuit filed but not yet acted upon.

5. Defendants are enjoined from denying work authorizations to and from deporting aliens within the Ninth Circuit whose applications were finally denied or were recommended for denial based on a finding that they are likely to become a public charge where such finding was made pursuant to 8 C.F.R. §§ 245a.1(1) [sic] or 245a.2(d)(4).

6. Within 30 days of the date of this order, defendants shall provide to the court and to plaintiffs' counsel a list of all applicants within the Ninth Circuit whose applications were finally denied or were recommended for denial based on the criteria in paragraph five above.

7. Within 30 days of the date of this order, defendants shall inform, by first class mail, all applicants identified in paragraph six above of the court's preliminary injunction. These persons shall be notified that their applications for legalization will be reopened and may be reconsidered.

8. Within 30 days of the date of this order defendants shall provide, within the Ninth Circuit, written notice of the court's preliminary injunction to all INS legalization offices and processing centers and to all Qualified Designated Entities.

The court is not satisfied with the identification procedures for membership in Class No. 2 proposed

by either plaintiffs or defendants. Therefore, pursuant to the Court's August 9th memorandum opinion, no interim relief will be provided to that class at this time.

IT IS SO ORDERED.

DATED: September 20, 1988.

/s/ Edward J. Garcia
EDWARD J. GARCIA
Judge
United States District Court

CERTIFICATE OF SERVICE

CIV-S-88-455-EJG

ZAMBRANO, ET AL

v.

INS, ET AL

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on 9-20-88, I served a copy of the attached ORDER by placing said copy in a postage paid envelope addressed to the person hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California, or by placing said copy into an inter-office delivery receptable [sic] located in the Clerk's Office.

Served by Mail:

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EDWARD J. GARCIA

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Deputy

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. No. S-88-455 EJG

MARTA ZAMBRANO, MARGARITA RODRIGUEZ, GRACIELA LOPEZ, ANDREA RUIZ, MARTHA OZUNA, and JORGE PERDOMO for themselves and for all others similarly situated, PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

ORDER GRANTING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT, PERMANENT INJUNCTION AND REDEFINITION OF CLASS

[Filed July 31, 1989]

This matter was before the court on June 30, 1989 for hearing on plaintiffs' motions for partial summary judgment, permanent injunction and redefinition of class two. Beth Zacovic, Pauline Gee and Steven [sic] Rosenbaum appeared on behalf of the plaintiffs. Robert Kendall and Special Assistant United States Attorney Glyndell Williams appeared on behalf of the defendants. After reviewing the file and the documents submitted and after hearing oral argument,

the court granted all of plaintiffs' motions. The court writes now to confirm its oral ruling.

This class action challenges regulations promulgated by the Immigration and Naturalization Service ("INS") which purport to implement portions of the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). Specifically, plaintiffs contend that the "Proof of Responsibility" and "Public Cash Assistance" regulations, 8 C.F.R. §§ 245a.2(d)(4) and 245a.1(i) respectively, violate portions of 8 U.S.C. § 1255a, the statute they are supposed to implement.

By memorandum opinion filed August 9, 1988 and an implementing order filed September 20, 1988, the court entered a preliminary injunction restraining defendants from applying these regulations to pending legalization applications. The court found that plaintiffs had established a likelihood of success on the merits and had demonstrated irreparable harm. In addition, the court ordered defendants to identify persons whose applications had been either finally denied or recommended for denial based on application of these two regulations and to reopen these applications and evaluate them based on what the court perceived to be the proper standard under the statute.

Defendants appealed from two portions of the court's orders. First, defendants contend the court erred in denying their motion to dismiss for lack of subject matter jurisdiction. Second, defendants contend the confidentiality provisions of 8 U.S.C. § 1255a (c)(5) prevent them from complying with paragraph six of the court's implementing order requiring disclosure of names of class members to class counsel. Defendants did not appeal from the substantive portions of the court's opinion, nor did they appeal the

court's provisional certification of class two based on the doctrine of equitable tolling. As will be discussed later, defendants' decision to limit their appeal to these two narrow issues plays an important role in the court's decision to grant, in large part, the relief plaintiffs seek.

Plaintiffs' Motion for Partial Summary Judgment

Both parties concede that this motion raises a purely legal question: Do the "proof of financial responsibility" and "public cash assistance" regulations, 8 C.F.R. §§ 245a.2(d)(4) and 245a.1(i) respectively, violate IRCA? Defendants have failed to provide substantive opposition to this motion. Instead, they contend that the court lacks jurisdiction to consider the motion as long as the Ninth Circuit has under consideration defendants' appeal from this court's order denying defendants' motion to dismiss for lack of subject matter jurisdiction. Alternatively, in connection with their opposition to plaintiffs' motion for a permanent injunction, defendants contend the motion for partial summary judgment is moot since the regulations have been amended and are now compatible with the statute.

Defendants' jurisdictional argument is without merit for several reasons. First, an appeal only divests a district court of jurisdiction to consider issues which are the subject of the appeal. "[A]n appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits." 9 J. Moore, *Moore's Federal Practice*, para. 203.11 at 3-54 and n.42 (2d ed.). *See also, People ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766

F.2d 1319, 1322, *modified on other grounds*, 775 F.2d 998 (9th Cir. 1985); *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). As pointed out earlier, defendants have only appealed two issues from the court's previous orders, neither of which are implicated in plaintiffs' motion for partial summary judgment.

Second, until the Ninth Circuit reaches a decision on the appeal, the controlling law is this court's previous order that the court *does* have subject matter jurisdiction to entertain plaintiffs' complaint. This is the "law of the case" doctrine and stands for the proposition that prior decisions on legal issues should be followed absent a change in the law or other factors not present here.

Lastly, the court's conclusion regarding subject matter jurisdiction was not erroneous. *See Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (11th Cir. 1989). In *Haitian Refugee Center*, the court was faced with the identical jurisdictional challenge presented here. The Eleventh Circuit affirmed the district court's denial of defendants' motion to dismiss, finding that plaintiffs' complaint challenged defendants' policies and practices and was not an attempt to gain judicial review of individual denials of legalization applications.[1]

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[1] The recent decision in *Ayuda v. Thornburgh*, No. 88-5226, (D.C. Cir. July 18, 1989) does not alter the court's conclusions and cannot be construed as a change in the law. The District of Columbia Circuit Court's decision that the district court lacked jurisdiction is not binding on this court and is not the law in this circuit. *See National Center for Immigrants Rights Inc. v. I.N.S.*, 743 F.2d 1365, 1368-69 (9th Cir. 1984). In addition, *Ayuda* fails to satisfactorily distinguish and is at odds with the decision in *Haitian Refugee Center*,

Aside from the jurisdictional argument, defendants' have raised no opposition to the legal issue presented in plaintiffs' motion for partial summary judgment. Nonetheless, the court has revisited its memorandum opinion, conducted a thorough review of the statute, the regulations and the legislative history surrounding passage of IRCA, and finds that plaintiffs' motion should be granted for the following reasons.

First, 8 C.F.R. §§ 245a.2(d)(4) and 245a.1(i) violate IRCA by failing to incorporate the traditional "totality of the circumstances" test for determining whether an alien is likely to become a public charge. Second, these regulations are more restrictive than the statute in three ways: 1) they apply a retrospective test rather than a prospective test; 2) they attribute public cash assistance provided to family members to the applicant; and 3) they require applicants to apply for a waiver before applying the special rule embodied in the statute.

Proof of the violative nature of the regulations is evidenced by the numerous clarification memos and letters discussed in the court's August 9th Memorandum Opinion. *See* Memorandum Opinion, at pp. 13-14. Defendants contend that these clarifications demonstrate defendants' voluntary cessation of application of the regulations. This argument misses the point for two reasons. First, the clarification memos and letters were never disseminated to the public, the applicants, or the qualified designated entities

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supra. *Ayuda* also fails to explain how class two members can exhaust administrative remedies when they failed to file applications in reliance on invalid regulations. Moreover, even if the court were inclined to reconsider its previous opinion, it lacks the authority to do so since the issue is on appeal.

("QDE") selected by Congress to assist aliens seeking amnesty. Second, even after issuance of the clarifications, plaintiffs' evidence demonstrates that defendants continued to rely on the challenged regulations to deny applications as well as require applicants to apply for waivers. *See* plaintiffs' Exhibits 45 and 46. In addition, on December 29, 1988 defendants reversed their position and adopted what this court perceived to be the proper two-tiered standard for determining whether an alien is likely to become a public charge. *See* plaintiffs' Exhibit 40.

In connection with their opposition to plaintiffs' motion for a permanent injunction, defendants argue that the legal issue to be resolved is moot. They contend that the clarification memos and the December 29th decision indicate that the INS is no longer relying on the challenged regulations. In addition, defendants contend that the regulations were amended to address the concerns raised in this lawsuit. First, 8 C.F.R. § 245a.1(i) was amended to provide that the receipt of public cash assistance by immediate family members no longer has any bearing on an applicant's eligibility for legalization. Second, 8 C.F.R. § 245a.2 (d)(4) was amended to require that each application be subjected to a two-tiered evaluation as contemplated by the statute. *See* Declaration of Terrance M. O'Reilly, attached to defendants' opposition filed June 19, 1989.

If the regulations have in fact been amended in this manner, plaintiffs appear to have achieved a portion of what they are seeking in this lawsuit. However, curiously absent from the O'Reilly declaration is any mention of the effective date of the amendment. In addition, even if the regulations have been amended, they will not become effective until published

in the Federal Register. *See* 5 U.S.C. § 553(b). Moreover, even were the amendment effective immediately, plaintiffs' claims for injunctive relief are not moot. For example, the amendments do not address applications which were denied between May 5, 1987 and the present, in reliance on the challenged regulations. Nor do the amendments provide a remedy for applicants who were required to pay waiver fees unnecessarily. More importantly, the amendments do not address at all class two members who failed to timely apply in reliance on the challenged regulations.

Based on the foregoing, the court finds that 8 C.F.R. §§ 245a.2(d)(4) and 245a.1(i) violate provisions of the Immigration Reform and Control Act of 1986. The regulations, both facially, and as interpreted by the INS, are inconsistent with the statute. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (agency interpretation cannot supercede [sic] Congressional language). Accordingly, the court finds that the regulations are invalid. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (court must enforce statute at expense of regulations where agency's interpretation, as embodied in its regulations, frustrates congressional policy and is inconsistent with statute).

Motion for Permanent Injunction

Plaintiffs request that the court grant permanent injunctive relief in the following forms: 1) enjoining defendants from applying the two invalid regulations to all legalization applications within the Ninth Circuit; 2) enjoining defendants from denying work authorizations and from deporting aliens within the Ninth Circuit whose applications were denied or recommended for denial; 3) requiring defendants to

apply the proper two-tiered standard to all legalization applications; 4) requiring defendants to identify and notify, in English and the applicant's primary language, all class one members whose applications were denied or recommended for denial that their applications will be reopened and reconsidered under the new correct public charge standard; 5) requiring defendants to identify and notify all class one members who were recommended for denial based on the invalid regulations and required to file a waiver, that they are entitled to have the waiver fee of $35 refunded; 6) requiring defendants to accept legalization applications from class two members for a period of one year even though their applications were not filed by the May 4, 1988 filing deadline); 7) requiring defendants to meet with plaintiffs in an attempt to adopt procedures and guidelines establishing evidentiary requirements and standards of proof to be imposed on class two members; and 8) requiring defendants to provide interim relief (temporary work authorizations/stays of deportation) to class two members prior to establishing the above standards if they file declarations setting forth a *prima facie* case of eligibility.

In support of this relief, plaintiffs contend they have met all the requirements for issuance of a permanent injunction: they have prevailed on the merits; the balance of equities favor an injunction; and the court has the equitable power to fashion the type of relief sought by plaintiffs.

Having determined that the regulations violate the statute, the court finds that plaintiffs have prevailed on the merits. Therefore, the remainder of this discussion will focus on the other two requirements.

1. Balance of equities

The balance of equities in this case favors issuance of an injunction for three reasons. First, plaintiffs have suffered and continue to suffer irreparable harm. Second, plaintiffs have no adequate remedy at law. Third, issuance of an injunction will not unduly burden defendants.

a. irreparable harm

Even though defendants contend plaintiffs' claims are moot because defendants have reversed their position with respect to the regulations, voluntary cessation on the part of the government does not deprive a court of power to grant a permanent injunction. *Enrico's, Inc. v. Rice*, 730 F.2d 1250 (9th Cir. 1984). Moreover, plaintiffs have submitted evidence that legalization applications of class one members are still being denied based on the invalid regulations and that these persons are being required to apply for a waiver. *See* plaintiffs' Exhibits 45 and 46. In addition, plaintiffs have attached declarations from more than 30 class two members who state that they applied late or were discouraged from applying at all because of reliance on the invalid regulations. Therefore, resolution of the legal issue does not vitiate the harm caused during the time the regulations were being applied.

b. adequacy of legal remedy

It is apparent that plaintiffs have no adequate remedy at law. Defendants' argument that plaintiffs should appeal their denials is without merit. There is no reason to require plaintiffs to exhaust their administrative remedies when this court has just de-

cleared the regulations invalid. In addition, defendants' exhaustion requirement has been considered and rejected by the court on at least two previous occasions. Furthermore, for class two members who applied late or who failed to apply at all, there is no denial from which they can appeal.

c. burden

Defendants have not addressed this issue. Suffice it to say that any administrative burden placed upon defendants to reconsider previously denied applications and accept new applications is outweighed by the harm plaintiffs have suffered by being denied their "constitutionally protected right to apply for temporary residency [status]" under IRCA. *See Haitian Refugee Center*, 872 F.2d at 1562.

2. Fashioning of relief

The court has broad discretion in fashioning relief after determining that plaintiffs have prevailed on the merits. *Handler v. Securities & Exchange Commission*, 610 F.2d 656, 659 (9th Cir. 1979). Ordering defendants to evaluate applications under the proper two-tiered standard for determining public charge easily falls within the court's equitable jurisdiction. The more difficult question involves plaintiffs' additional requests for refunds of waiver fees and processing of applications by class two members who did not apply by the statutory deadline of May 4, 1988.

In his June 29, 1989 declaration, Terrance M. O'Reilly, acting assistant commissioner of legalization for the INS, concedes that defendants may have

improperly collected waiver fees. Defendants agree to review all applications filed after August 9, 1988 to determine whether requests for waivers were necessary; therefore, it appears defendants do not oppose this portion of plaintiffs' requested relief. However, at the hearing, plaintiffs requested that defendants expand the scope of their review to encompass all applications filed since May 5, 1987, the effective date of the amnesty program. Since the definition of class one specifically includes persons whose applications were filed between May 5, 1987 and May 4, 1988, and since defendants failed to appeal from the portion of the court's memorandum opinion certifying the case to proceed as a class action, and since equity seems to compel this result, it is appropriate for defendants' review to encompass all applications which fall within the class definition.

Moreover, there is authority that the relief sought by plaintiffs does fall within this court's equitable jurisdiction. In *Porter v. Warner Holding Company*, 328 U.S. 395 (1946), the court required reimbursement of rents collected in violation of a statute, reasoning that restitution was justified either as part of the permanent injunction or as "an order appropriate and necessary to enforce compliance with the [statute]."

Defendants' reliance on *Pittston Coal Group v. McLaughlin*, 109 S.Ct. 414 (1988), to support their argument that an adjudicated case should not be reopened is misplaced. As plaintiffs point out, that case is factually distinguishable. None of the plaintiffs in *Pittston* had sought judicial relief prior to the running of the statute of limitations. In addition, the court had already reopened the cases once and was merely rejecting plaintiffs' claim of perpetual reopen-

ing. In the case before this court, plaintiffs have timely preserved their claims by seeking relief prior to the running of the statute of limitations, as well as prior to the close of the amnesty application deadline. Accordingly, defendants shall review all applications filed between May 5, 1987 and May 4, 1988 to determine if waiver fees were improperly collected in reliance on the invalid regulations.

Plaintiffs request that this court order the defendants to accept applications from class two members who failed to apply by May 4, 1988 by applying the doctrines of equitable tolling or equitable estoppel. This issue was fully briefed in connection with plaintiffs' motion for preliminary injunction. At that time the court indicated its inclination to employ the doctrine of equitable tolling for class two members should plaintiffs prevail on the merits. *See* Memorandum Opinion pp. 20-24.

Since the issuance of the court's memorandum opinion on August 9, 1988, in which it found that the Supreme Court's recent decision in *INS v. Pangilinan*, 108 S.Ct. 2210 (1988) did not preclude use of the doctrine of equitable tolling to allow the late filing of applications by class two members, several other courts have addressed the issue of extending the deadline, have distinguished *Pangilinan*, and have fashioned relief for persons who missed the deadline because of their reliance on invalid regulations. *See In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989); *Perales v. Meese*, No. 88-265 (S.D.N.Y., Order of March 29, 1989); *Ayuda v. Meese*, 700 F.Supp. 48, 50 (D.D.C. 1988); *League of United Latin American Citizens v. INS*, No. 87-4557 (C.D. Cal., Order of August 12, 1988); *Catholic Social Services v. Meese*,

No. 86-1343 LKK (E.D. Cal., Orders of June 10 and August 11, 1988).

Defendants advance two arguments in opposition to plaintiffs' request for relief for class two members. First, they have appealed Judge Karlton's June 10, 1988 order in *Catholic Social Services v. Meese* which extended the filing deadline by six months and fashioned relief for those who did not timely apply. Defendants request that this court stay a decision fashioning any relief for class two members until after the Ninth Circuit decides *Catholic Social Services*. This argument is not persuasive. Defendants had the opportunity to appeal the portion of this court's August 9th decision dealing with equitable tolling, yet chose not to do so. Moreover, Judge Karlton's extension of the filing deadline was not based on the doctrine of equitable tolling, but rather on the court's broad equitable powers. Thus, any decision reached by the Ninth Circuit in *Catholic Social Services* might not apply to the doctrine of equitable tolling espoused in this court's order.

Alternatively, defendants request a continuance of this portion of plaintiffs' motion for at least 60 days so defendants can conduct discovery of class two members. This argument is also rejected. Defendants have known since the complaint was filed in April of 1988 that plaintiffs sought relief for persons who had not filed applications by the statutory deadline. In addition, defendants have been aware of this court's position on equitable tolling as well as its intent to extend the filing deadline if plaintiffs were to prevail on the merits, since the memorandum opinion was filed in August 1988. Thus, there is no reason to grant a continuance. Defendants have had 14

months in which to conduct discovery of class two members.

Based on the foregoing, and for the reasons stated in its memorandum opinion, this court will apply the doctrine of equitable tolling to grant relief to class two members. However, the court is not inclined to toll the filing deadline for the one year period requested by the plaintiffs. Instead, the INS is ordered to accept legalization applications from class two members from the date of this order through December 31, 1989. The filing of an application should not be construed to confer membership in class two on the applicant. Procedures will have to be established by which the INS can verify the veracity of the applicants' claims that they are entitled to class membership because they would have timely applied for legalization but for reliance on the invalid regulations.

At the hearing on June 30, 1989, defendants requested a stay pending appeal of the court's intended decision granting plaintiffs' motion for relief for class two members. The standards for granting a stay pending appeal are similar to those for granting preliminary injunctive relief. *See Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977). In the Ninth Circuit, those standards require the moving party to demonstrate a likelihood of success on the merits coupled with the possibility of irreparable harm, or that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. *See National Center for Immigrants Rights, Inc. v. Immigration & Naturalization Service*, 743 F.2d 1365, 1369 (9th Cir. 1984).

In light of the proliferation of recent opinions distinguishing *Pangilinan*, defendants have failed to demonstrate a likelihood of success on an appeal of

this issue, nor have they addressed the nature of irreparable harm they might face. Moreover, as discussed previously, the balance of hardships clearly tip in plaintiffs' favor since any administrative burden is outweighed by the harm caused to plaintiffs by being denied their entitlement to apply for temporary residency status. *See Haitian Refugee Center, supra.* Accordingly, defendants' request for a stay is denied.

Motion to Redefine Class 2

Class two is presently defined as follows:

> All persons residing within the Ninth Circuit who were otherwise eligible for adjustment of status under 8 U.S.C. § 1255a but who had not applied for legalization by May 4, 1988 because they had been discouraged from applying by the *INS or by any qualified designated entity ("QDE")* because of the regulations defining Proof of Financial Responsibility and Public Cash Assistance.

(Memorandum Opinion, p. 16) (emphasis added). This is a court-crafted definition and not what was sought in plaintiffs' motion for class certification. In their motion plaintiffs defined class 2 as follows:

> All persons residing within the Ninth Circuit who have not applied for legalization because they have been discouraged from applying for Section 245A legalization by the INS or by any organization because of the regulations concerning "Proof of Financial Responsibility".

At the time the court certified the case to proceed as a class action, it specifically limited the source of class two membership to persons who had been dis-

couraged from applying by either the INS or a QDE. The court was concerned that opening up the class to those who had been discouraged from applying by talking with private attorneys, from listening to the radio or television, or by receiving information from self-help citizens' groups would create an impossible proof problem.

Plaintiffs contend the court's class definition is too restrictive and will not reach those persons who were discouraged from applying by means or persons other than the INS or a QDE. In support, plaintiffs have attached over 30 declarations of potential class two members, private attorneys, church workers and others who support plaintiffs' contention that the potential applicants were discouraged from applying in a myriad of ways, and that relief should not be limited to those who spoke directly with the INS or a QDE. While questions of proof remain problematic, the court adopts plaintiffs' suggestion that the parties meet and confer concerning evidentiary standards to be imposed on class two members prior to receiving relief.

SUMMARY

Based on the foregoing, plaintiffs' motions for partial summary judgment, permanent injunction and redefinition of class two are granted. Plaintiffs' proposed order, the specifics of which were not objected to by defendants, has been adopted in large part by the court and is incorporated below. Accordingly, IT IS HEREBY ORDERED that:

1. Defendants are permanently enjoined from applying 8 C.F.R. § 245a.2(d)(4) and from applying the definition of public assistance set out in 8 C.F.R.

§ 245a.1(i), to all legalization applications within the Ninth Circuit.

2. Defendants are enjoined from denying work authorization and from deporting aliens within the Ninth Circuit whose applications were finally denied or were recommended for denial based on a finding that they are likely to become a public charge where such finding was made pursuant to either 8 C.F.R. § 245A.1(i) or § 245a.2(d)(4).

3. Defendants are required to apply the proper two-tiered evaluation for determining if an alien is likely to become a public charge to all legalization applications. Defendants are required to first apply the traditional prospective test for determining a public charge based on the totality of the alien's circumstances, including factors such as the applicants' [sic] age, health, and existence of family or friends in the United States willing to assure the applicant's support, before applying the Special Rule set out in 8 U.S.C. § 1255(d)(2)(B)(iii). Income received by United States citizen family members from governmental assistance programs shall not be attributed to the applicant. An applicant may be allowed to post a public charge bond if the factors in his or her behalf are borderline. A waiver may be required if the applicant does not meet the conditions of the "Special Rule."

4. Within 30 days of the date of this order, defendants shall identify all applicants within the Ninth Circuit whose applications were denied or recommended for denial between May 5, 1987 and the present based on a finding made pursuant to 8 C.F.R. § 245a.1(i) or § 245a.2(d)(4), including those applicants ordered to be identified pursuant to the court's orders of September 20, 1988 and March 14, 1989.

5. Within 30 days of the date of this order, defendants shall, by written notice in English and in the applicant's primary language, by first class mail, inform all identified class one members that their applications for legalization will be reopened and reconsidered and shall inform them of the proper public charge standard as set out in paragraph 3 of this order along with the names, addresses and phone number of plaintiffs' counsel.

6. Within 30 days from the date of this order, defendants shall identify class one members who were recommended for denial and required to file a waiver of public charge based on the enjoined public charge regulations and provide notice in English and in the applicant's primary language, that they may be entitled to a refund of $35 and that the defendants may refund that amount upon request of the applicant.

7. In the event the Ninth Circuit affirms paragraph 6 of this court's September 20, 1988 order, defendants shall provide a list of the names and addresses of all identified class one members to the court and to plaintiffs' counsel within 30 days of the Ninth Circuit decision.

8. From the date of this order through December 31, 1989, defendants shall accept for filing and shall process legalization applications from class two members who were discouraged from filing applications by May 4, 1988 as a result of the enjoined regulations and who are otherwise *prima facie* eligible for legalization as defined in 8 C.F.R. § 245a.1(n).

9. Within 10 days of the date of this order, counsel for defendants shall meet and confer with plaintiffs' counsel to provide a mutually agreed procedure and guidelines setting forth the evidentiary requirements and standards of proof to be imposed on class two

members to demonstrate: (a) that they received eligibility information based on the enjoined public charge regulations and as a result, believed they were ineligible and did not file an application by May 4, 1988; and (b) that they or their family members received some form of public assistance. If no agreement can be reached, both parties shall file a statement with the court setting out the issues of disagreement, and reasons therefore [sic]. The court will decide the disputed issues and may order a further hearing.

10. In the interim, and no later than 10 days from date of this order, defendants shall accept for filing legalization applications and declarations under penalty of perjury from potential class two members which state: (a) that the applicant or his or her family members received or are receiving public assistance, approximate dates of receipt of such assistance, and type of public assistance; (b) a description of how the person became aware that he or she was not eligible for legalization because of past or current receipt of public assistance; (c) that as a result, the person did not file a legalization application by May 4, 1988; and (d) that the person has resided continuously in the United States since January 1, 1982 and believes he or she is otherwise eligible for legalization but for missing the May 4, 1988 deadline.

11. All applications filed pursuant to this order shall be finally adjudicated in accordance with the procedures and guidelines set out in paragraph 3 of this order and 8 U.S.C. § 1255a. Appeals from denials of legalization applications filed pursuant to this order, shall be taken in accordance with provisions of 8 U.S.C. § 1255a and the regulations promulgated thereunder for administrative and judicial review of such applications.

12. Upon submission of a declaration as provided in paragraph 10, defendants shall grant to class two members employment work authorizations, stays of deportation, and the confidentiality protections set out in IRCA pending final adjudication of the legalization application.

13. With respect to class two members who are apprehended and detained, defendants shall: (a) advise in writing in English and in the primary language of the applicant about the provisions of this order and its possible application to them; (b) provide a blank Class Membership Declaration to be completed by the applicant; (c) provide the names, addresses and phone numbers of plaintiffs' counsel; and (d) shall not take any actions to deport the applicant from the United States for 90 days for purposes of filing a Class Declaration and legalization application.

14. Within 60 days of the date of this order, defendants shall identify through their records all class members who (a) were issued an order to show cause; (b) were granted voluntary departure or deported from the United States, or otherwise removed by the INS; or (c) are currently in OSC proceedings and are *prima facie* eligible for legalization but for application of the public charge regulations. All persons so identified shall be notified by the INS in writing in English and in their primary language, regarding their right to apply for legalization under this order and of the names, addresses, and phone numbers of plaintiffs' counsel. Such notices shall be sent to the applicants' last known address.

15. Within 30 days from the date of this order, defendants shall file and serve on plaintiffs a proposed plan which includes proposed notice(s) for publicizing to QDEs, to community, social and immi-

grants' rights organization and the interested electronic and print media provisions of this order; of the requirements for filing class two declarations and legalization applications; and the names, address and phone numbers of plaintiffs' counsel.

Defendants and plaintiffs will meet and confer as to the contents of the plan within 10 days from the date of this order. In the event of unresolved disputes, the parties will follow the procedure set out in paragraph 9 of this order.

16. Defendants shall advise all INS district offices, legalization offices and regional processing facilities within the Ninth Circuit of the provisions of this order and the proper standards for public charge as enjoined herein with a copy to plaintiffs' counsel by way of legalization wire, cable, memorandum or other appropriate writing.

17. This court shall retain jurisdiction to assure that this order is carried out fully and completely and to provide such other and further relief as may be necessary to implement the order.

18. Defendants will send a monthly report to plaintiffs' counsel for the purposes of monitoring performance of the terms of this order. The monitoring report should include, but is not limited to: (a) the number of individuals notified under paragraphs 5, 6 & 14; (b) the number of individuals who received refunds of their waiver fees; (c) the number of applicants filing legalization applications after May 4, 1988; (d) the total number of approved and denied applications.

IT IS SO ORDERED.

DATED: July 31, 1989.

/s/ Edward J. Garcia
EDWARD J. GARCIA
Judge
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CERTIFICATE OF SERVICE

CIV-S-88-455-EJG

ZAMBRANO, ET AL

v.

INS, ET AL

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on JUL 31, 1989, I served a copy of the attached ORDER by placing said copy in a postage paid envelope addressed to the person hereinafter listed, by depositing said envelope in the U.S. Mail at Sacramento, California, or by placing said copy into an inter-office delivery receptable [sic] located in the Clerk's Office.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S-88-455 EJG-EM

MARTA ZAMBRANO, ET AL., and on behalf of all persons similarly situated, PLAINTIFFS

v.

RICHARD THORNBURGH, Attorney General of the United States, ET AL., DEFENDANTS

STIPULATION TO AND JOINT APPLICATION FOR A STAY PENDING APPEAL AND PROPOSED ORDER THEREON

[Lodged Aug. 11, 1989; Filed Aug. 15, 1989]

(FRCivP 62(d), (e) and Rule 141, Rules of the United States District Court, Eastern District of California)

On July 31, 1989, this court issued an Order Granting Plaintiffs' Motions For Partial Summary Judgment, Permanent Injunction and Redefinition of Class (hereinafter "Order") (A copy of the Order is attached hereto as Attachment 1). The Order permanently enjoined the INS from applying 8 C.F.R.

§ 245a.2(d)(4) and 8 C.F.R. § 245a.1(i) to all legalization applications within the Ninth Circuit and required the INS to take certain actions including the accepting of applications for legalization under the Immigration Reform and Control Act of 1986 ("IRCA") from class two members. In addition in paragraphs 9 and 15 of the Order, the court requires that the plaintiffs and defendants meet within 10 days to agree to a plan implementing the terms of the court's Order. Because the ten days granted by court will expire on August 14, 1989, both parties believe that time is of the essence in reaching a mutually beneficial partial stay of the Order and seeking the approval of the court of the terms of that agreement.

At the hearing before this court on June 30, 1989, counsel for the defendants only requested a stay of the court's intended order granting plaintiffs' motion for relief for class two members, pending appeal of the motion. The court denied that motion for a stay of relief for class two members pending appeal in its written July 31, 1989 Order. (See Order, at p. 15). On August 4, 1989 the Defendants filed a Notice of Appeal from the district court's July 31, 1989 Order and phone notice was given on August 3, 1989 to plaintiffs' counsel that the defendants would seek a stay of the Court's Order as to relief ordered for both class one and class two members.

On August 3, 4, 7, 8, and 9, 1989, counsel for both parties held numerous telephone conferences and reached agreement concerning the terms of a partial stay of the district court's July 31, 1989 Order pending the appeal of that Order. The agreement reached by the parties, in brief, protects class two members by requiring the INS, *inter alia*, to: accept legalization applications from class two members for filing; grant

work authorization and stays of deportation to class two members; to provide the confidentiality protections set forth in IRCA to class two members; and to process class one applications under the two tiered public charge test, instead of the enjoined regulations. The agreement also relieves the INS of certain administrative obligations under the order pending its appeal by staying, *inter alia*, portions of the order which require the INS to process legalization applications from class two members, and to provide further notice to class one members. In addition, the agreement stays paragraph 9 of the order which requires the parties to meet to establish evidentiary standards.

The parties, therefore, hereby stipulate and agree to the terms and conditions of the partial stay pending the resolution of the appeal of this Order by the Ninth Circuit Court of Appeals, subject to the court's approval, as follows:

A. Paragraphs 4, 5, 6, 8, 9, 11, 13, 14, 15, 17, and 18 of the district court's July 31, 1989 Order are stayed pending resolution of the appeal by the Ninth Circuit Court of Appeals.

B. Paragraphs 1, 2, 3, 7, 10, 12, and 16 of the district court's July 31, 1989 Order are not stayed pending the resolution of the appeal by the Ninth Circuit Court of Appeals. Those paragraphs provide as follows:

> 1. Defendants are permanently enjoined from applying 8 C.F.R. § 245a.2(d)(4) and from applying the definition of public assistance set out in 8 C.F.R. § 245a.1(i), to all legalization applications within the Ninth Circuit.
>
> 2. Defendants are enjoined from denying work authorization and from deporting aliens within the Ninth Circuit whose applications were fi-

nally denied or were recommended for denial based on a finding that they are likely to become a public charge where such finding was made pursuant to either 8 C.F.R. § 245A.1(i) or § 245a.2(d)(4).

3. Defendants are required to apply the proper two-tiered evaluation for determining if an alien is likely to become a public charge to all legalization applications. Defendants are required to first apply the traditional prospective test for determining a public charge based on the totality of the alien's circumstances, including factors such as the applicants' [sic] age, health, and existence of family or friends in the United States willing to assure the applicant's support, before applying the Special Rule set out in 8 U.S.C. § 1255(d)(2)(B)(iii). Income received by the United States citizen family members from governmental assistance programs shall not be attributed to the applicant. An applicant may be allowed to post a public charge bond if the factors in his or her behalf are borderline. A waiver may be required if the applicant does not meet the conditions of the "Special Rule."

* * * * *

7. In the event that the Ninth Circuit affirms paragraph 6 of the this [sic] court's September 20, 1988 order [currently pending as *Zambrano et al. v. Thornburgh et al.*, Nos. 88-15438 and 88-15533 (9th Cir.)] defendants shall provide a list of names and addresses of all identified class one members to the court and to plaintiffs' counsel within 30 days of the Ninth Circuit decision.

* * * * *

10. In the interim, and no later than 10 days from date of this order, defendants shall accept for filing legalization applications and declarations under penalty of perjury from potential class two members which state: (a) that the applicant or his or her family members received or are receiving public assistance, approximate dates of receipt of such assistance, and type of public assistance; (b) a description of how the person became aware that he or she was not eligible for legalization because of past or current receipt of public assistance; (c) that as a result, the person did not file a legalization application by May 4, 1988; and (d) that the person has resided continuously in the United States since January 1, 1982 and believes he or she is otherwise eligible for legalization but for missing the May , 1988 [sic] deadline.

* * * * *

12. Upon submission of a declaration as provided in paragraph 10, defendants shall grant to class two members employment work authorizations, stays of deportation, and the confidentiality protection set out in IRCA pending final adjudication of the legalization application.

* * * * *

16. Defendants shall advise all INS district offices, legalization offices and regional processing facilities within the Ninth Circuit of the provisions of this order and the proper standards for public charge as enjoined herein with a copy to plaintiff's [sic] counsel by way of legalization wire, cable, memorandum or other appropriate writing.

C. The defendants will accept the legalization applications of class two members, supporting documentation, and the sworn declaration required in paragraph 10 of the July 31, 1989 Order without payment of the filing fee. If the defendants do not prevail on the merits of the appeal and the legalization applications must be processed by the INS, the requisite filing fee must be paid by the alien prior to processing. If the defendants prevail on the merits of the appeal, the accepted applications will not be processed by the INS, and the applications will be destroyed.

D. Defendants will inquire of aliens apprehended and detained regarding their membership in class two. Defendants need make no inquiry of aliens apprehended by the INS entering or attempting to enter the United States without inspection or unlawfully through a port-of-entry.

E. Defendants shall provide apprehended or detained aliens identified as class two members in accordance with the provisions in paragraph D above with the names, addresses, and phone numbers of plaintiffs' counsel, Beth Zacovic Nevins, Legal Aid Society of San Mateo County, 298 Fuller Street, Redwood City, CA 94063, (415) 365-8411, Pauline Gee, California Rural Legal Assistance, 818 D Street, Marysville, CA 95901 (916) 742-5191; and Stephen A. Rosenbaum, California Rural Legal Assistance, 2111 Mission Street, Suite 401, San Francisco, CA 94110, (415) 864-3405, Vibiana Andrade, National Center for Immigrants' Rights, 1636 W. Eighth Street, Suite 215, Los Angeles, CA 90017, (213) 487-2531 and advise such class members that they may contact plaintiffs' counsel for additional information regarding their rights as class members after INS inquiry.

F. Defendants shall advise all INS district offices, legalization offices and regional processing facilities within the Ninth Circuit of the provisions of the partial stay using the procedure in paragraph 16 of the district court's July 31, 1989 Order within seven working days from the date of the court's approval of the stipulated partial stay.

G. By stipulating and agreeing to the terms of this partial stay, neither party waives any rights as to the appeal on the merits of the July 31, 1989 Order.

Respectfully submitted,

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Attorneys for the Plaintiffs-Appellees
Dated this 10th day of August, 1989

ORDER

Based upon the stipulation of the parties, and after review by this Court, the Court hereby approves the above partial stay of the district court's July 31, 1989 Order pending resolution of the appeal from that Order by the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated: August 15, 1989

/s/ Edward J. Garcia
EDWARD J. GARCIA
Judge
United States District Court

APPENDIX F

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period

Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

(B) Application within 30 days of show-cause order

An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 1252 of this title, must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is later.

(C) Information included in application

Each application under this subsection shall contain such information as the Attorney General may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 1154(a) of this title.

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors

If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien

must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since November 6, 1986

(A) In general

The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences

An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant

The alien must establish that he—

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and

(D) is registered or registering under the Military Selective Service Act [50 App. U.S.C. 451 et seq.], if the alien is required to be so registered under that Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1522 note] shall be considered to have entered the United States and to be in an unlawful status in the United States.

* * * * *

8 U.S.C. 1255a(d)(2)(B)(iii) (1988):

* * * * *

(iii) Special rule for determination of public charge

An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

* * * * *

8 U.S.C. 1255a(f):

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

8 U.S.C. 1182 (1988)

§ 1182. Excludable aliens

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be excluded from admission into the United States:

* * * * *

(15) Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges;

* * * * *

8 U.S.C. 1182(a)(4)(Supp. III 1991):

(4) Public charge

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.

§ 1255a(d)(2)(B)(iii)(Supp. III 1991):

(iii) Special rule for determination of public charge

An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(4) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 C.F.R. 245a.1(i) (1988)

(i) "Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. 245a.2(k)(4) (1988)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

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No. 92-849

In The

Supreme Court of the United States

October Term, 1992

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

MARTA ZAMBRANO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Did the district court have federal question jurisdiction over a claim that final INS legalization regulations violated the Immigration Reform and Control Act?

2. After finding that INS had implemented unlawful regulations throughout the whole of the INS-designated application period, did the court have the authority to provide a remedy for that unlawful conduct?

TABLE OF CONTENTS

Page

Misstatement of the Regulations Challenged 2

Statement 2

Reasons for Denying the Writ 8

Point I

Contrary to Petitioners' Assertion in *CSS*, There is No Conflict in the Circuits on the Issue of District Court Jurisdiction to Review Challenges to INS Legalization Regulations..... 8

Point II

There is No Conflict in the Circuits on the Issue of Judicial Authority to Remedy Unlawful INS Action 10

Point III

The Circuit Court Rulings in This Case and *CSS* are Completely Consistent with Supreme Court Precedent 10

Point IV

If This Court Rules for Petitioners in *CSS*, There are Outstanding Issues in This Case Warranting a Remand to the Ninth Circuit 14

Conclusion 16

Appendix..... 1a

8 C.F.R. § 245a.2(d)(4), 52 Fed.Reg. 16211 (May 1, 1987) 1a

8 C.F.R. § 245a.1(i), 52 Fed.Reg. 16208 (May 1, 1987)..... 1a

8 C.F.R. § 245a.2(k)(4), 52 Fed.Reg. 16212 (May 1, 1987) 2a

TABLE OF CONTENTS – Continued

Page

8 C.F.R. § 245a.2(k)(2), 52 Fed.Reg. 16212 (May 1, 1987) 2a

8 C.F.R. § 245a.2(k)(4), 52 Fed.Reg. 43844 (Nov. 17, 1987) 4a

8 C.F.R. § 245a.2(d)(4), 54 Fed.Reg. 29449 (July 12, 1989) 5a

8 C.F.R. § 245a.1(i), 54 Fed.Reg. 29448 (July 12, 1989) 5a

8 C.F.R. § 245a.2(k)(4), 54 Fed.Reg. 29449 (July 12, 1989) 6a

TABLE OF AUTHORITIES

Page

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Ayuda, Inc. v. Thornburgh, 948 F.2d 742 (D.C. Cir. 1991), petition for cert. pending, No. 91-1924 ... 8, 9, 10

Ayuda, Inc. v. Thornburgh, 958 F. 2d 1089 (D.C. Cir. 1992) 8, 9

Barr v. Catholic Social Services, Inc., 112 S.Ct. 2990 (1992) 8

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 10, 11, 12

Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914 (9th Cir. 1992), *cert. granted sub nom. Barr v. Catholic Social Services, Inc.*, No. 91-1826, 112 S.Ct. 2990 (1992) ..... *passim*

INS v. Pangilinan, 486 U.S. 875 (1988) 12, 13, 15

Johnson v. Robison, 415 U.S. 361 (1974) 14

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 10

Legalization Assistance Project v. INS, 976 F.2d 1198 (9th Cir. 1992) 10, 12, 15

McNary v. Haitian Refugee Center Inc., ___ U.S. ___, 111 S. Ct. 888 (1991) 3, 10, 11, 12, 13

Morales v. Yeutter, 952 F. 2d 954 (7th Cir. 1991) 9, 11

Perales v. Thornburgh, 967 F.2d 798 (2d Cir. 1992), *petition for cert. pending*, No. 92-451 ... 7, 9, 10, 12, 15

Zambrano v. INS, Civ. No. S-88-455 (E.D. Cal. July 31, 1989) *aff'd*, 972 F.2d 1122 (9th Cir. 1992), *petition for cert. pending*, No. 92-849 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS:

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 2

8 U.S.C. § 1182(a)(4) 4

8 U.S.C. § 1255a(a) 4

8 U.S.C. § 1255a(c)(2) 3

8 U.S.C. § 1255a(c)(5) 4

8 U.S.C. § 1255a(d)(2)(B) 5

8 U.S.C. § 1255a(i) 3

8 U.S.C. § 1324a 3

8 C.F.R. § 245a.1(i), 52 Fed.Reg. 16208 (May 1, 1987) 2, 5

8 C.F.R. § 245a.1(i), 54 Fed.Reg. 29448 (July 12, 1989) 2, 5

8 C.F.R. § 245a.2(a)(1) 4

8 C.F.R. § 245a.2(b) 4

8 C.F.R. § 245a.2(d)(4), 52 Fed. Reg. 16211 (May 1, 1987) 2, 5

8 C.F.R. § 245a.2(d)(4), 54 Fed. Reg. 29449 (July 12, 1989) 2

8 C.F.R. § 245a.2(k)(4), 52 Fed. Reg. 16212 (May 1, 1987) 2, 5

8 C.F.R. § 245a.2(k)(2), 52 Fed. Reg. 16212 (May 1, 1987) 2

8 C.F.R. § 245a.2(k)(4), 52 Fed. Reg. 43844 (Nov. 17, 1987) 2

TABLE OF AUTHORITIES – Continued

Page

8 C.F.R. § 245a.2(k)(4), 54 Fed. Reg. 29449 (July 12, 1989) 2

54 Fed.Reg. 29448-49 7

MISCELLANEOUS

132 Cong. Rec. H9712-13 (Oct. 9, 1986) 3

H.R. Rep. No. 99-682, Part 1, 99th Cong., 2d Sess 3

Brief for Petitioners, *Barr v. Catholic Social Services, Inc.*, No. 91-1826 ..... *passim*

Petition for a Writ of Certiorari, *Barr v. Catholic Social Services, Inc.*, No. 91-1826 ..... *passim*

Petition for a Writ of Certiorari, *INS v. Zambrano*, No. 92-849 ..... 6, 8

Supreme Court Rule 10.1(a) 10

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In The

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IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

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MARTA ZAMBRANO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The petition should be denied because there is no conflict in the circuits on the issues presented and the Ninth Circuit's decision comports with Supreme Court precedent.

MISSTATEMENT OF THE REGULATIONS CHALLENGED

The petition does not accurately describe the regulations challenged in this case. Petitioners set forth in their Appendix provisions labeled 8 C.F.R. § 245a.2(d)(4) (1988) and 8 C.F.R. § 245a.2(k)(4) (1988). These are not the regulations challenged in this case nor were these rules in effect in 1988.

The regulatory provisions challenged in this case were those in effect as of May 1, 1987, 52 Fed.Reg. 16205: 8 C.F.R. § 245a.1(i) (1987), 8 C.F.R. § 245a.2(d)(4) (1987) and 8 C.F.R. § 245a.2(k)(4) (1987). (App., *infra*, 1a-2a). These regulations were amended on November 17, 1987, 52 Fed.Reg. 43843 (App., *infra*, 4a) and further amended on July 12, 1989, 54 Fed.Reg. 29442, 8 C.F.R. § 245a.1(i) (1989), 8 C.F.R. § 245a.2(d)(4) (1989) and 8 C.F.R. § 245a.2(k)(4) (1989) (App., *infra*, 5a-6a).

To correct petitioners' misstatements, the applicable regulations are reproduced in the Appendix to this brief. They are not discussed in detail because the petitioners do not contest the district court's holding that the regulations were unlawful. The opinions of the court below provide a detailed, accurate explanation of these regulations, their regulatory history and the underlying legislative history. *Zambrano v. INS*, Orders of Aug. 9, 1988; July 31, 1989 (Pet. App., 22a-24a, 47a-49a).

STATEMENT

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, created a

mandatory entitlement to legalization for several classes of deportable aliens who lived "in a twilight, sub rosa society . . . vulnerable to exploitation. . . . " 132 Cong. Rec. H9712-13 (Oct. 9, 1986) (Statement of Rep. Mazzoli). Congress intended that the legalization application period, for these individuals who had "contributed to the United States in myriad ways . . . ," run for a full twelve months. Legalization was to be "implemented in a liberal and generous fashion . . . to ensure true resolution of the problem and . . . that the program [would] be a one-time only program." H.R. Rep. No. 99-682, Part I, 99th Cong., 2d Sess. 49, 72, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5653, 5676.[1]

Congress recognized that the legalization program could succeed only if "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status . . . " could be overcome. *McNary v. Haitian Refugee Center*, ___ U.S. ___, 111 S. Ct. 888, 892 (1991). IRCA thus required the Attorney General to "broadly disseminate information" about legalization and its eligibility requirements beginning no later than the first day of the program. The Act also called for the Attorney General to designate and train community-based organizations – "qualified designated entities (QDEs) – to help disseminate legalization eligibility information and to assist individuals in filing their applications. 8 U.S.C. § 1255a(c)(2); (i).

---

[1] Congress also implemented an employer sanctions program to prevent undocumented aliens in the U.S. from working in the future. 8 U.S.C. § 1324a.

Another section of the statute provided that all applicant information, with limited exceptions, remain confidential and not be used for any purpose other than adjudication of legalization claims. 8 U.S.C. § 1255a(c)(5).[2]

INS's regulations required aliens to apply for temporary resident status – the first phase of the legalization program – between May 5, 1987 and May 4, 1988[3] and set forth the eligibility criteria for legalization. 8 C.F.R. §§ 245a.2(a)(1), (b).

Under IRCA, the Attorney General "shall" confer legal status on any individual who makes a "timely application," has resided in the U.S. since before January 1, 1982 and is otherwise admissible as an immigrant. 8 U.S.C. § 1255a(a). One of the grounds of inadmissibility is that the applicant is "likely at any time to become a public charge . . . " 8 U.S.C. § 1182(a)(4).[4] To effectuate the Act's goals as stated above, Congress liberalized the standards for those who could not meet the traditional "public charge" test. That is, an otherwise eligible applicant

[2] Citing this provision, INS appealed portions of the district court orders that required the agency to disclose the names of certain class members to class counsel. The Ninth Circuit affirmed the orders of the lower court, *Zambrano*, 972 F.2d at 1125-26, and the Service does not raise that issue in the present petition.

[3] IRCA required that the Attorney General designate a "12-month period beginning on a date (not later than 180 days after November 6, 1986) . . . ," i.e. May 5, 1987. 8 U.S.C. § 1255a(a)(1)(A). The application period did in fact begin on that date and closed on May 4, 1988.

[4] Before 1990, this provision was codified at § 1182(a)(*15*).

who could show an employment history and other forms of self-support must be granted legalization.[5] 8 U.S.C. § 1255a(d)(2)(B)(iii)(Supp. II 1990).

The INS, however, implemented regulations that required more than self-support and also made the grant of legalization to a self-supporting applicant discretionary. 8 C.F.R. §§ 245a.2(d)(4); 245a.1(i); 245a.2(k)(4); 52 Fed. Reg. 16211, 16208, 16212 (May 1, 1987).

Respondents are a class of individual legalization applicants,[6] mainly immigrant parents. These people have lived in the United States since before 1982 and have been self-supporting. They or their U.S. citizen children have at one time received some type of public assistance to which they were legally entitled. However, as noted above, the published regulations that were in force throughout the entire application period excluded these immigrant parents and others from the legalization program.

[5] An applicant failing to meet this relaxed test could still request a waiver from INS. 8 U.S.C. § 1255a(d)(2)(B)(i) - (ii).

[6] The first subclass is composed of all legalization applicants residing within the Ninth Circuit whose timely-filed applications were or would be denied on the basis that they were likely to become a public charge. Orders of Aug. 9, 1988; Sept. 20, 1988. (Pet. App., 25a-27a; 38a). The second subclass includes all persons within the Ninth Circuit who were discouraged from applying for legalization by the May 1988 deadline by the INS or any organization because of the regulations concerning "proof of financial responsibility." Order of July 31, 1989. (Pet. App., 57a-58a).

Respondents commenced an action challenging these regulations – as contrary to IRCA and the U.S. Constitution – while the legalization application period was still open and moved for a preliminary injunction. They sought an order requiring INS to (1) disseminate the correct public charge standard before the end of the application period while class members could still file for legalization; and (2) reconsider those applications which were erroneously denied. The district court granted respondents' motion on August 9, 1988.[7] (Pet. App., 12a).

Almost one year later, the lower court granted respondents' motion for *partial* summary judgment,[8] modified the class definition and entered a permanent injunction. Order of July 31, 1989. (Pet. App., 43a). The court reaffirmed its holdings that jurisdiction was proper and that it had the authority, under the doctrine of equitable tolling, to order INS to begin accepting applications – during a 6-month period – from individuals who had earlier been discouraged from applying because of the agency's illegal regulations and failure to disseminate proper information as to the public charge standard.[9]

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[7] The court held – and INS did not appeal – that the "proof of financial responsibility" and "public cash assistance" regulations violated the IRCA public charge provisions. Order of Aug. 9, 1988. (Pet. App., 22a-24a).

[8] INS incorrectly characterized the motion as one for *summary* judgment. *Zambrano* Petition at 5. The district court affirmed its earlier ruling that the regulations in question violated IRCA. Order of July 31, 1989. (Pet. App., 47a-49a). Again, INS did not appeal this portion of the order.

[9] On December 11, 1989, the court partially granted respondents' motion for contempt against INS because the agency had,

Petitioners (hereafter "INS" or "the Service") do not contest the district court's holding that these regulations violated IRCA[10]. In fact, INS admitted the unlawfulness of the regulations by changing them in 1989 after the agency-designated application period closed. 54 Fed.Reg. 29448-49 (July 12, 1989). INS now asserts only that the district court did not have the authority to decide whether the regulations comported with the statute and that, even if subject matter jurisdiction existed, the court did not have authority to provide a remedy for harm caused by the agency's implementation of unlawful regulations. Petition for a Writ of Certiorari, *INS v. Zambrano*, 92-849 at 6-7 (hereafter *Zambrano* Petition).

After consolidating the appeals, the Ninth Circuit affirmed the lower court's rulings. *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992) (Pet. App., 1a).

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inter alia, failed to accept applications for filing from certain would-be class members. Respondents appealed other portions of the order. However, the Ninth Circuit upheld the district court, *Zambrano*, 972 F.2d at 1126, and respondents have not filed a cross-petition for a writ of certiorari with this Court.

[10] The same regulations challenged here were declared unlawful by the Second Circuit Court of Appeals, and INS declined to appeal that ruling. *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992), *petition for cert. pending on other grds. sub nom. Barr v. Perales*, No. 92-451.

REASONS FOR DENYING THE WRIT

POINT I

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE OF DISTRICT COURT JURISDICTION TO REVIEW CHALLENGES TO INS LEGALIZATION REGULATIONS.

INS asserts that the writ should be granted in this case because it raises questions similar to those pending before the Court in *Barr v. Catholic Social Services, Inc.*, No. 91-1826 (hereafter *CSS*). *Zambrano* Petition at 6. The basis for the petition for certiorari in *CSS* was the erroneous contention that there is conflict in the circuits on the issue of district court jurisdiction to review INS's legalization regulations. The *CSS* petition points to the case of *Ayuda, Inc. v. Thornbugh*, 948 F.2d 742 (D.C. Cir. 1991), *petition for cert. pending*, No. 91-1924, as being in conflict with the decision in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir.), *cert. granted sub nom. Barr v. Catholic Social Services, Inc.*, 112 S. Ct. 2990 (1992). *CSS* petition at 10. On the contrary, the decision of the D.C. Circuit denying rehearing *en banc* in *Ayuda* makes clear that there is no intercircuit conflict on the question presented here and in *CSS*: whether IRCA precludes general federal question jurisdiction over a claim that final INS legalization regulations violate that statute. *Ayuda, Inc. v. Thornburgh*, 958 F. 2d 1089 (D.C. Cir. 1992).

Judge Silberman, joined by Judge Ginsburg, wrote the *Ayuda* panel decision relied upon by *CSS* petitioners

for their claim of intercircuit conflict.[11] Yet, in a separate opinion supporting denial of rehearing *en banc*,[12] Judge Silberman, again joined by Judge Ginsburg, concluded that there is *no* "intercircuit dispute" on the question of subject-matter jurisdiction to review INS regulations. He noted that the Seventh Circuit in *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991), had upheld district court jurisdiction to review formal final INS legalization regulations as had the Ninth Circuit in *CSS*. Judge Silberman distinguished *Morales* and *CSS* on the ground that *Ayuda* did not involve a challenge to "formal (and final) regulations." *Ayuda*, 958 F.2d at 1093. Judge Posner drew this same distinction in *Morales*, 952 F. 2d at 957. *See also, Perales*, 967 F.2d at 807.[13]

Thus, three circuits – the Second, Seventh and Ninth – agree that the district courts have subject-matter jurisdiction over challenges to INS legalization regulations and the D.C. Circuit has expressed no disagreement.

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[11] The *Ayuda* panel had decided, on the alternative grounds of lack of either ripeness or subject matter jurisdiction, that the district court could not consider the contention that INS misinterpreted the legalization statute by failing to recognize persons who had not filed a particular form as "known to the government." The plaintiffs had argued that this failure was a challengeable INS practice. *Ayuda*, 948 F.2d at 745, 754.

[12] The D.C. Circuit denied a hearing *en banc per curiam*, with five members in favor of granting rehearing. Judges Wald and Williams pointed to the lack of ripeness holding as the basis for the Circuit's decision to deny rehearing *en banc*. *Ayuda*, 958 F.2d at 1090, 1093.

[13] Writing for the court in *Perales*, Judge Walker would also subject *other* agency action to judicial review. 967 F.2d at 806-808.

POINT II

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE OF JUDICIAL AUTHORITY TO REMEDY UNLAWFUL INS ACTION.

Similarly, there is no intercircuit conflict on the second question presented by INS: whether the federal judiciary can provide a remedy for the agency's illegal administration of the legalization program. The Second Circuit and three panels of the Ninth Circuit have answered this question in the affirmative. *Perales*, 967 F.2d at 811-814; *CSS*, 956 F. 2d at 919-921; *Zambrano*, 972 F. 2d at 1124; *Legalization Assistance Project v. INS*, 976 F.2d 1198, 1213; 1215 (9th Cir. 1992). The D.C. Circuit, in *Ayuda*, did not reach this issue. 948 F. 2d at 756.

There being no intercircuit conflict on either issue presented, certiorari was improvidently granted in *CSS* on that basis and should not be granted here. *See, Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393 (1923). *See also*, Supreme Court Rule 10.1(a).

POINT III

THE CIRCUIT COURT RULINGS IN THIS CASE AND *CSS* ARE COMPLETELY CONSISTENT WITH SUPREME COURT PRECEDENT.

As this Court reaffirmed only two terms ago, there is a "well-settled presumption" allowing judicial review of agency action. *McNary*, 111 S. Ct. at 898. *See also, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). The circuit court's determination in this case and *CSS* that subject-matter jurisdiction exists for challenges

to agency regulations violative of federal statutes is fully consistent with this Court's precedent. *See, Bowen*, 476 U.S. at 670-674. *See also, Morales v. Yeutter*, 952 F. 2d at 957.

INS's position, on the other hand, is completely contrary to the norm of effective and fair judicial review of whether agency regulations comply with a statute. In this case, petitioners would allow INS to prevent any judicial review of its admitted unlawful action and therefore to violate the law with impunity. According to the INS, any judicial consideration of whether agency regulations comport with the statute would depend entirely on whether the agency affirmatively decided to initiate a deportation proceeding.

The consequences of this position for the respondent immigrant parents and their citizen children would be devastating. The parents would be subject to deportation and foreclosed access to lawful employment. *See, McNary*, 111 S. Ct. at 891, 895. Their children would be doomed to perpetual welfare dependency and either the underground life of their undocumented parents or total separation from their parents. As this Court found in *McNary*, such a scenario is tantamount to a complete denial of judicial review. *McNary*, 111 S. Ct. at 898.

Further, under the Service's position, even if INS did initiate a deportation proceeding, the issue of whether the regulations comport with the statute would be reviewed by components of the agency that have no authority to determine that issue. After such costly, inefficient and useless delay, the court of appeals would confront the issue without the benefit of district court

consideration. Moreover, the judicial determinations could not occur within the one-year time period set for legalization, thus assuring that the courts would not have an effective, meaningful voice in stating what a statute means. This is "the practical equivalent of total denial of judicial review" of statutory claims. *Id.*

Additionally, the circuit court rulings in *CSS* and this case on the relief issue fully comport with IRCA and this Court's precedents. INS sought certiorari in *CSS* on the assertion that the Ninth Circuit's allowance of a judicial remedy there conflicts with "this Court's analysis in *[INS v.] Pangilinan*," 486 U.S. 875 (1988). *CSS* Petition at 20.

Subsequent to the government's petition in *CSS*, the Second Circuit issued its decision in *Perales*, holding that nothing in IRCA or *Pangilinan* strips the federal judiciary of its traditional power to remedy agency violations of federal law. *Perales*, 967 F.2d at 811-814. *Accord, Zambrano v. INS*, 972 F.2d at 1124-25; *Legalization Assistance Project v. INS*, 976 F.2d at 1215. *See, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 681 (noting the settled presumption that Congress "expects the courts to grant relief when an executive agency violates [a statutory] command").[14]

In essence, INS's contention is that *Pangilinan* indiscriminately bars judicial relief in any case involving an

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[14] As noted above, INS has conceded that it violated federal law in its administration of the legalization program.

immigration statute and a filing deadline.[15] This proposition is illogical, since in the name of deference to Congress, it would prohibit judicial relief even where such relief advances congressional intent. As the Ninth Circuit rightly concluded, *Pangilinan* simply does not posit such an extreme and irrational rule. Rather, in *Pangilinan*, this Court carefully determined Congress' intent with respect to the statutes at issue and gave effect to that intent. 486 U.S. at 884-885.

Thus, there is no credible claim that the Ninth and Second Circuits failed to abide by *Pangilinan*, since the teaching of that decision is that congressional intent controls. This Court's only statement on the congressional intent behind IRCA appears in *McNary*, which reaffirmed that Congress meant to create a "broad," remedial legalization program. 111 S. Ct. at 890-892 and nn. 4-5. Nothing in IRCA and no decision of this Court is remotely to the contrary.

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[15] The Service has asserted that *Pangilinan* is "on all fours with" *CSS*. *CSS* Petition at 17. But, the underlying statutes in the two cases – the Naturalization Act of 1940, as amended, and the Immigration Reform and Control Act of 1986 – bear no resemblance to one another with respect to legislative mandate, policy or intent.

POINT IV

IF THIS COURT RULES FOR PETITIONERS IN *CSS*, THERE ARE OUTSTANDING ISSUES IN THIS CASE WARRANTING A REMAND TO THE NINTH CIRCUIT.

INS states that the Ninth Circuit's decision in this case should be reversed if this Court determines that the district court, in *CSS*, did not have authority to determine whether an INS regulation comported with IRCA. *Zambrano* Petition at 6. If this Court makes such a determination in *CSS*, the *Zambrano* case should not be reversed. Rather, it should be remanded to the Ninth Circuit.

There was one claim that neither the Ninth Circuit nor the district court addressed in this case. *Zambrano v. INS*, 972 F.2d 1122; Civ. No. S-88-455, (E.D. Cal., Orders of Aug. 9, 1988 and July 31, 1989). In addition to their claim that the INS regulations violated IRCA, respondents also challenged the rules as a violation of their right to equal protection of the law. Pltfs' Second Amended Cmplt., ¶¶ 61-64. The Service concedes that the presumption in favor of judicial review of Constitutional claims is even stronger than the presumption in favor of review of statutory claims. Brief for Petitioners, *Barr v. CSS*, No. 91-1826 at 20. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974). Therefore, even if this Court finds there was no subject-matter jurisdiction in *CSS*, it should remand this case to the Ninth Circuit.

Also, if this Court agrees with INS that in *CSS* the court of appeals lacked authority to provide an opportunity for legalization applicants to file applications after the agency-imposed deadline, this case should be

remanded to the Ninth Circuit. The district court based its remedy decision on only one of the claims made and the specific facts of the *Zambrano* case as applied to that one claim. The other claim and appropriate remedies would have to be assessed. Respondents' Constitutional claim stands on a different footing from the statutory claims in *CSS*, since federal judicial authority to remedy legal wrongs is at its height where Constitutional rights have been abridged. See *Pangilinan*, 486 U.S. at 885-886 (separately analyzing Constitutional claims after concluding that Congress intended to foreclose relief for alleged statutory violations).

Remand would also be appropriate if this Court does not reach the remedial doctrine of equitable tolling in *CSS*.[16] The district court in *Zambrano* made clear that its decision was based on this doctrine. Orders of Aug. 9, 1988 and July 31, 1989. (Pet. App., 32a-33a, 55a). As the Ninth Circuit in *Zambrano* did not distinguish the basis of its ruling, but followed its prior decision in *CSS* as the law of the circuit, *Zambrano*, 972 F.2d at 1124-25, this remedial question may still remain. Therefore, remand, not reversal, would be appropriate.

If this Court affirms the *CSS* determinations on subject matter-jurisdiction and remedy, the decision in this case should be affirmed or the writ denied.

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[16] The Ninth Circuit did not address the applicability of the equitable tolling doctrine in *CSS*, 956 F.2d at 921-923, or in *Legalization Assistance Project*, 976 F.2d at 1215. The Second Circuit declined to consider the doctrine in *Perales*. 967 F.2d at 811.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 15, 1992

APPENDIX

8 C.F.R. §245a.2(d)(4), 52 Fed. Reg. 16211 (May 1, 1987)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment, the burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant.

8 C.F.R. §245a.1(i), 52 Fed. Reg. 16208 (May 1, 1987)

(i) "Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food

stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 16212 (May 1, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision, the weight given in considering applicability of the public charge provisions will depend on may [sic] factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(k)(2), 52 Fed. Reg. 16212 (May 1, 1987)

(2) Waiver of grounds of exclusion. Except as provided in paragraph (k)(3) of this section, the

Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised on the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the district

director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 43844 (Nov. 17, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision, the weight given in considering applicability of the public charge provisions will depend on may [sic] factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(d)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges, generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide.

8 C.F.R. §245a.1(i), 54 Fed. Reg. 29448 (July 12, 1989)

(i) "Public cash assistance" means income or needs-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency

treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

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